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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 85

FEDERAL TRADE COMMISSION, PETITIONER

vs.

BUNTE BROTHERS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 20, 1940
CERTIORARI GRANTED OCTOBER 14, 1940

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IN THE

United States Circuit Court of Appeals
For the Seventh Circuit

No. 6792

BUNTE BROTHERS, INC., A CORPORATION,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

Counsel for Petitioner:
MR. SAMUEL G. CLAWSON,

Counsel for Respondent:
MR. W. T. KELLEY.

Petition for Review of Order of Federal Trade Commission.

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Filed Nov. 5, 1938.

And on, to wit: On the fifth day of November, 1938, there was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit a Petition for Review of Order of the Federal Trade Commission, which said Petition for Review is in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, 1938, October Session, 1938.

Bunte Brothers, Inc., a corporation,
Petitioner,
vs.
Federal Trade Commission,
Respondent.
} No. 6792.

PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Your petitioner, Bunte Brothers, Inc., respectfully represents:

1. That it is an Illinois corporation with its principal place of business in Chicago, Cook County, Illinois, and that it is now and at all the times hereinafter mentioned has been carrying on business in the City, County and State aforesaid and within the jurisdiction of the United States Circuit Court of Appeals for the Seventh Circuit;

2. That on January 29, 1936 the Federal Trade Commission caused its purported complaint (Docket No. 2695) to be issued against your petitioner attempting to allege the use of unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of an Act of Congress approved September 26, 1914 entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes"; the answer of your petitioner to said complaint was filed thereafter in said proceeding;

3. That thereafter purported hearings were held in said proceeding before trial examiners employed by respondent; that on September 7, 1938 respondent filed its report

and its purported findings as to the facts and conclusion of law and also issues its purported order to cease and desist against your petitioner; that a true and correct copy of said report and findings, said conclusion of law and said cease and desist order is attached hereto, marked Exhibit "A" and made a part hereof; that thereafter, in said proceeding, petitioner filed an exception to said cease and desist order, which said exception is dated September 16, 1938;

4. That on September 27, 1937 petitioner filed in said proceeding a motion to limit hearings to the offices of the Commission located in Chicago, Illinois; this motion was denied by an order entered by the Commission on or about September 28, 1937, which said order was duly excepted to by petitioner;

5. That on September 6, 1938 an order was entered by the Commission denying a motion filed by petitioner in said proceeding on March 23, 1938, to dismiss said complaint, which said order was duly excepted to by petitioner;

6. That your petitioner, believing itself aggrieved by said purported cease and desist order of the respondent and considering it unauthorized, erroneous, void and unlawfully prejudicial to your petitioner, and your petitioner, being without remedy in the premises except in this Court as by statute in such cases made and provided, hereby petitions for a Review of said purported order of the Commission by this Honorable Court, and makes the following Statement and relies upon the following Assignments of Error:

Statement.

The purported complaint charges that petitioner is a candy manufacturer with its place of business located in Chicago, Illinois, and that it sells and ships from said place of business certain candy assortments known in the candy trade as "break and take" assortments to purchasers located in the State of Illinois, and that said practice constitutes an unfair method of competition within the intent and meaning of Section 5 of an Act of Congress, entitled "An Act to Create a Federal Trade Commission, to define its powers and duties, and for other purposes", approved September 26, 1914.

Such assortments consist of a number of pieces of candy retailing at one cent each and contain colored centers. Pieces that have certain colored centers entitle the purchasers thereof to a larger bar of candy free of charge.

The smaller pieces of candy retailing at one cent each are broken open by the purchaser to determine the color of the center. The assortments consist of both the smaller pieces of candy and the prizes and are sold as such a unit to the purchasers of such assortments.

Petitioner sells and ships such assortments from its place of business located in Chicago, Illinois, to purchasers located in the State of Illinois. Petitioner does not ship such assortments to purchasers located elsewhere and the complaint only is concerned with sales and shipments entirely within the State of Illinois.

The purported cease and desist order attempts to restrain, among other things, the Illinois sales and shipments of such "break and take" assortments.

Assignments of Error.

Assignment of Error Number One: The respondent did not have jurisdiction to issue the complaint, to make findings of fact or to enter said cease and desist order against petitioner in said proceeding.

Assignment of Error Number Two: The Commission does not have jurisdiction to restrain intrastate sales and shipments of "break and take" assortments.

Assignment of Error Number Three: The purported complaint of respondent does not allege sufficient facts to give said respondent jurisdiction of the purported proceeding or of any proceeding.

Assignment of Error Number Four: The hearing granted by the respondent in this proceeding was not a full and fair hearing and did not comply with the requirements of the Constitution of the United States.

Assignment of Error Number Five: The purported findings as to the facts of the respondent are not supported by the evidence.

Assignment of Error Number Six: The purported findings as to the facts of the respondent are contrary to and inconsistent with the evidence.

Assignment of Error Number Seven: The respondent erred in failing to make findings as to the facts on all of the material issues raised and presented in said proceeding; that if respondent had made findings as to the facts on all of the material issues raised and presented in said proceeding, said cease and desist order would have been erroneous, arbitrary and unauthorized and contrary to such findings.

Assignment of Error Number Eight: That the respond-

ent erroneously denied the motion of your petitioner to limit hearings in said proceeding to the offices of the Commission located in Chicago, Illinois, filed September 27, 1937 in said proceeding, a copy of which said motion will appear in the transcript of the record in said proceeding to be filed herein by respondent.

Assignment of Error Number Nine: That the respondent erroneously failed and refused to grant the motion of your petitioner to limit hearings in said proceeding to the offices of the Commission located in Chicago, Illinois.

Assignment of Error Number Ten: That the respondent erroneously denied the motion of your petitioner to dismiss said proceeding, which said motion was filed in said proceeding on March 23, 1938.

Assignment of Error Number Eleven: That the respondent erroneously failed and refused to grant the motion of your petitioner to dismiss.

Assignment of Error Number Twelve: That the respondent erred in stating mere conclusions of law as findings of fact.

Assignment of Error Number Thirteen: That the purported findings as to the facts of the respondent are not sufficient in law to support or sustain the purported order to cease and desist of the respondent.

Assignment of Error Number Fourteen: That the testimony and the entire record in said proceeding shows that said proceeding is not in the interest of the public; that the issuance of the respondent's purported order to cease and desist was erroneous, unauthorized and void.

Assignment of Error Number Fifteen: That the testimony and the entire record in said proceeding shows that your petitioner was not using and is not using any unfair method of competition or unfair or deceptive act or practice in interstate commerce; that the issuance of the respondent's purported order to cease and desist was erroneous, unauthorized and void.

Assignment of Error Number Sixteen: That petitioner believes the respondent erroneously admitted, over due and timely objections made by your petitioner which were overruled and to which rulings your petitioner duly excepted, considerable irrelevant, immaterial and incompetent testimony offered on behalf of the respondent the substance of which will be set forth by your petitioner in its brief to be filed herein after the transcript of the entire record in said proceeding is filed herein by respondent.

Assignment of Error Number Seventeen: That petitioner believes the respondent erroneously excluded, to

which your petitioner duly excepted, considerable relevant, material and competent testimony offered on behalf of your petitioner, the substance of which will be set forth by your petitioner in its brief to be filed herein after the transcript of the entire record in said proceeding is filed herein by respondent.

Assignment of Error Number Eighteen: That the respondent erred in making its purported order to cease and desist too broad.

Assignment of Error Number Nineteen: That Sections 3 and 5 of the Act of Congress, known as Public Act No. 447, passed by the 75th Session of Congress, entitled, "An Act to amend the Act creating the Federal Trade Commission to define its powers and duties and for other purposes", approved by the President of the United States on March 21, 1938 are unconstitutional and by reason thereof said purported order to cease and desist issued by the respondent is a nullity and is void and of no force and effect.

Assignment of Error Number Twenty: That the Act of Congress, known as Public Act No. 447, passed by the 75th Session of Congress, entitled, "An Act to amend the Act creating the Federal Trade Commission to define its powers and duties and for other purposes", approved by the President of the United States on March 21, 1938 is unconstitutional and by reason thereof said purported order to cease and desist issued by the respondent is a nullity and is void and of no force and effect.

Wherefore, your petitioner prays that this Honorable Court exercise its jurisdiction over the parties and subject matter of this petition.

Your petitioner further prays that this Honorable Court review the findings and order of the respondent in said cause and enter a decree in this Honorable Court setting aside the order of the Federal Trade Commission entered on the 7th day of September, A. D. 1938 against your petitioner and that such other and further orders and decrees be made as to the Court may seem just.

Bunte Brothers, Inc.,
By: Ferdinand A. Bunte,
Vice-President,
3301-3359 Franklin Blvd.
Chicago, Illinois.

Samuel G. Clawson,
Attorney for Petitioner,
105 W. Adams St.,
Chicago, Illinois.
Randolph 8894.

State of Illinois }
County of Cook } ss.

Ferdinand A. Bunte, being first duly sworn on oath, deposes and says that he is Vice-President of Bunte Brothers, Inc., petitioner; that he has read the above and foregoing petition by him subscribed and knows the contents thereof and that the same is true in substance and in fact except as to those allegations alleged on belief and as to those he verily believes them to be true; that he subscribed said petition in his capacity as such Vice-President of the petitioner, Bunte Brothers, Inc., being thereunto duly authorized.

Ferdinand A. Bunte.

Subscribed and sworn to before me this 4th day of November, A. D. 1938.

Florence M. Comar,
Notary Public.

(Seal)

EXHIBIT "A".

UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

Docket No. 2695.

In the Matter of: Bunte Brothers, Inc.

ORDER.

UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission held at its office in the City of Washington, D. C., on the 7th day of September, A. D. 1938.

Commissioners:

Garland S. Ferguson, Chairman,
Charles H. March,
Ewin L. Davis,
William A. Ayres,
Robert E. Freer.

In the Matter of
Bunte Brothers, Inc., a corporation. } Docket No. 2695.

FINDINGS AS TO THE FACTS AND CONCLUSION.

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on January 29, 1936, issued and served its complaint in this proceeding upon respondent, Bunte Brothers, Inc., charging it with the use of unfair methods of competition in commerce, in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondent's answer thereto, testimony and other evidence in support of the allegations of said complaint were introduced by P. C. Kolinski, attorney for the Commission, and in opposition to the allegations of the complaint by Samuel G. Clawson and L. R. Krein, attorneys for the respondent, before Miles J. Furnas, Irving D. Royal, and W. W. Sheppard, examiners for the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final hearing before the Commission on the said complaint, the answer thereto, testimony and other evidence, briefs in support of the complaint and in opposition thereto, and the oral arguments of counsel aforesaid; and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom:

Exhibit "A".

Findings as to the Facts.

Paragraph One: Respondent is a corporation, organized in 1903, existing and doing business under the laws of the State of Illinois, with its principal office and place of business located at 3301 Franklin Boulevard, Chicago, Illinois. It is now, and for several years last past has been, engaged in the manufacture of candies and in the sale and distribution thereof to wholesale dealers, jobbers, and retail dealers located in the various states of the United States, and particularly in the State of Illinois.

Paragraph Two: The candy industry in the United States represents a capital investment of approximately $150,000,000.00, with the annual dollar volume of the product of the industry exceeding the sum of $250,000,000.00. The greater part of this product is referred to in the candy trade as "straight merchandise" or "straight goods." The term "straight goods" is used to describe those products which are normally sold at a stated price per unit, and not sold, or designed to be sold, to consumers under any plan constituting a lottery or involving an element of chance. Some "straight goods" are nationally advertised so as to create a consumer demand for them, which gives rise to a defined current of commerce throughout the several states of the United States from the states of manufacture of such nationally advertised candy. Respondent, in the conduct of its business, is in competition with other corporations and with individuals and partnerships, located in various states of the United States other than the State of Illinois, that are engaged in the manufacture, sale, and distribution of candies and confections in commerce between and among the various states of the United States, and particularly from the states in which said products are manufactured to the State of Illinois.

Some of the product of the industry is sold in assortments involving the use of chance in the sale and distribution thereof to the ultimate purchasers or consumers. Such chance assortments are variously referred to in the industry as "break and take", "draw," or "deal" assortments. While they may vary in minor details, all of them operate under the principle of making the amount of return to the purchaser dependent upon chance. The sale, in interstate commerce, of such assortments involving chance has been declared unlawful by the Supreme Court of the United States, and at the time testimony was closed

in this proceeding there were outstanding, against one hundred and twenty-seven (127) competitors of respondent, orders requiring them to cease and desist from the use of such methods in connection with their sales in interstate commerce.

Paragraph Three: In the course and conduct of its business, respondent sells to dealers in the State of Illinois certain assortments involving the use of chance in the sale and distribution thereof to ultimate purchasers. One of these assortments is composed of a number of wrapped caramels of uniform size, shape, and quality, a number of larger pieces of candy, and a box of candy, which larger pieces and box of candy are to be given as prizes to purchasers of certain of the caramels in the following manner:

The majority of the caramels in the assortment have the same color, but a small number of them have a different color. All of the caramels of uniform size, shape, and quality in the assortment retail at the price of one cent each; but every purchaser who procures one of the caramels having a color different from the majority in the assortment is entitled to receive, and is given, without additional charge, one of the larger pieces of candy heretofore referred to. The purchaser of the last piece of caramel candy of uniform size, shape, and quality in each assortment is entitled to receive, and is given, without additional charge, a box of candy. The color of the caramels is effectively concealed from purchasers and prospective purchasers until a selection has been made and the wrapper removed. The purchaser of said caramels who procures one having a color different from the majority in the assortment thus obtains one of the larger pieces of candy wholly by lot or chance.

This assortment was sold to the candy trade in Illinois during the summer months of the year 1935, and was designated "Summer Bar Assortment." It is a chance assortment known as "break and take", and was so identified by respondent. While it varies from the assortment described in the complaint in the particular concerning the last prize, it is nevertheless identical in principle, and was so admitted by respondent.

Respondent also manufactures, and distributes in the State of Illinois, another chance assortment designated as "Ta-ka-Flyer Bar Assortment." Its principle of sale and distribution is the same as that of the assortment described in the complaint, and it was so identified by the respondent. It is a chance assortment of the type known

as "break and take," consisting of 160 pieces of candy, of which 20 have differently colored centers. The units with differently colored centers are used to identify winners of prizes; in other words, the purchaser procuring a unit with a differently colored center receives one of the larger pieces of candy as a prize, without additional charge. The units are sold to ultimate purchasers at the price of one cent each. Respondent's volume of sales of its "Ta-Ka-Flyer Bar Assortment" in the State of Illinois was 40,000 assortments in 1935, and 86,000 assortments in 1936.

The above described chance assortments were distributed to 95% of the candy jobbers in the State of Illinois through the services of sixteen full-time salesman employed by respondent, during the years 1935 and 1936. The dollar volume of respondent's sales of penny candies in Illinois in 1935 was $275,400. In 1936 it was $314,400, of which the chance assortments of the "break and take" variety constituted approximately 23%. Such "break and take" assortments are distributed by the jobbers to retail dealers, so that they may be seen practically wherever candy is sold in the State of Illinois.

Paragraph Four: The above described assortments are assembled and packed by respondent in such a manner that they may be used by retail dealers for sale and distribution to the public by lot or chance without alteration or rearrangement. Respondent has knowledge that the candy packed in such assortments will be sold to the consuming public by retail dealers by lot or chance. The retail dealers to whom said assortments are sold and distributed expose the same for sale, and sell the candy to the purchasing public in accordance with the above described sales plan.

Paragraph Five: Respondent's above described assortments are sold and distributed by many retail dealers located in the vicinity of schools, and they attract the patronage of school children. School children purchase candies from the "break and take" assortments in preference to buying "straight candies," because of the chance or gaming feature connected with the "break and take" assortment. Advertising methods are used to stimulate such demand among children. Witnesses from the candy industry, comprising manufacturers, salesmen, jobbers, and retailers, testified that the sale of such "break and take" assortments teaches and encourages gambling among children, who comprise the principal purchasers and consumers of candy sold in this manner.

Paragraph Six: Candies so packed as to involve the element of chance in their sale and distribution are in direct competition with candies so packed as to be sold only as straight goods, and are so displayed to prospective customers. All candies are sold through the same type of merchandising channels. Jobbers who handle chance assortments also handle straight goods. Many retail dealers prefer to buy all of their candies from one jobber because of the convenience of dealing with only one salesman, one order blank and one bill to be paid. Such retail dealers who desire chance assortments will, therefore, buy all of their candy requirements from a jobber who sells chance assortments.

Paragraph Seven: The representatives of 48 candy manufacturers, with plants located in 13 other states of the United States and shipping in excess of an annual volume of $1,440,000 of straight candies from their plants to the State of Illinois, found that their failure to carry chance assortments, particularly of the "break and take" type, has been, and is, a decided handicap in securing business in the State of Illinois. Some of these representatives had called on dealers who needed "straight candies" for their stock of merchandise and who would have purchased the "straight goods" offered for sale by these representatives, but because such dealers also desired chance assortments and preferred to give the whole order to one salesman, it was impossible to sell anything to them.

Representatives of the above mentioned candy manufacturers located outside of the State of Illinois discovered that a salesman who can offer chance assortments of candy has a tremendous advantage in soliciting business from jobbers over one who does not have such chance assortments. This was variously described as a "leeway" an "advantage", and an "in". Ability to display a chance assortment creates advantage in many ways. Often the offer of a chance assortment to a jobber will attract interest that otherwise does not exist, and will act as a "door opener" or an "order opener." Having interested the jobber and sold him chance assortments, the jobber will then add to the same order his requirements of straight goods, because of the convenience of one shipment.

Paragraph Eight: The sale of straight candy is adversely affected by the sale of chance assortments of candy in Illinois, particularly of the break and take variety. This

adverse effect was shown by a reduction in the volume of straight goods sold in Illinois.

Some out-of-state manufacturers experienced a marked decrease in their sales of straight goods in Illinois at times when the sale of chance assortments, particularly of the break and take variety, was active in Illinois. A representative of a New York manufacturer suffered a marked decline in his sales of straight candies in the Illinois market in May and June of 1935 over sales of straight candies in the same market in May and June of 1934. The sale of chance assortments of the break and take variety was particularly active in Illinois in May and June of 1935. The sales of a Pennsylvania manufacturer of a competing confection, chewing gum, in Illinois in September and October of 1935 were but 74% and 62%, respectively, of his sales in the same market during the same months in 1934. The sale of chance assortments of candies, particularly of the break and take variety, was very active in Illinois during September and October, 1935, far more so than during the same months in 1934. The presence in the Illinois market of 40,000 of respondent's break and take chance assortments during the year 1935 was a strong factor contributing to the sales declines these interstate competitors of respondent suffered. A New York manufacturer was repeatedly asked by his Chicago sales representative to distribute a chance assortment of the break and take variety, but he felt under a moral compulsion not to resort to such practices. Rather than indulge in the same, he withdrew entirely from the Illinois market.

A competitor of respondent, located in the State of Wisconsin, who had been ordered by this Commission to cease and desist from selling break and take candy assortments in interstate commerce, within a four months period following the date of such order, suffered an 80% reduction of sales in Illinois from the $60,000 volume rate of the preceding year. This Wisconsin competitor's telephone and telegraph expense to Illinois had declined, advertising expense to the state had been cut $150, and the company had discontinued one of its Illinois salesmen. The Illinois business of another Wisconsin competitor of respondent, who had been doing an annual volume of $100,000 of candy business in Illinois, and against whom the Commission had issued a similar order, was adversely affected 20%. These particular competitors are located within 100 miles of the Illinois market, and their loss of business is due directly to the presence of break and take candy in the Illinois candy market.

Paragraph Nine: Respondent's competitors from other states would be placed on an equal competitive basis if respondent ceased the sale and distribution of chance assortments in Illinois. A substantial portion at least of the people who now buy candies from chance assortments would purchase candy of some kind, regardless of the method of sale and distribution, so that absence of chance assortments would result in an increase in the total volume of business done in straight candies.

Paragraph Ten: Respondent's sale and distribution of "break and take" candy assortments as set forth in these findings is a lottery scheme, game of chance, or gambling method. It encourages gambling among children, who are enticed by the element of chance to purchase candy thus sold in preference to straight candy. Respondent's use of such method in the sale and distribution of its candies has the capacity and tendency to, and did and does, divert trade and custom to itself from its competitors who sell and distribute only straight candies; it has the capacity and tendency to, and in some cases did and does, exclude from the Illinois market competitors who are unwilling to use the chance assortment method in the sale and distribution of their candies or who are restrained from so doing; and it has the capacity and tendency to create in respondent a monopoly of the Illinois candy trade.

Respondent's use of chance assortments in the sale and distribution of its candies in Illinois has a direct and powerful burdensome effect upon interstate commerce in candies from other states to the State of Illinois, and gives respondent an undue and unreasonable preference over competitors located in other states, in that it:

(a) Reduces the amount of business in straight candies that may be competed for by manufacturers in other states by the amount that chance assortments detract from the sale of straight goods to ultimate purchasers or consumers.

(b) Eliminates from interstate competition all sales of straight candies to dealers who desire chance assortments and who prefer to buy their chance assortments and straight goods from a single salesman in one lot.

(c) Secures for respondent sympathetic access to prospective purchasers denied to its competitors from other states.

(d) Secures for respondent orders for straight candies from dealers who have purchased its chance assortments and who, to fill out a sizeable order, for convenient shipment, or for other reasons, will add thereto their requirements of straight candies.

Conclusion.

The aforesaid acts and practices of respondent, Bunte Brothers, Inc., are all to the prejudice of the public and of respondent's competitors, and constitute unfair methods of competition within the intent and meaning of the Federal Trade Commission Act.

By the Commission.

(signed) Garland S. Ferguson,
Chairman.

(Seal)

Dated this 7th day of September, A. D. 1938.

Attest:
(signed) Otis B. Johnson,
Secretary.

UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission held at its office in the City of Washington, D. C., on the 7th day of September, A. D. 1938.

Commissioners:

Garland S. Ferguson, Chairman,
Charles H. March,
Ewin L. Davis,
William A. Ayres,
Robert E. Freer.

In the Matter of
Bunte Brothers, Inc., a corporation. } Docket No. 2695.

ORDER TO CEASE AND DESIST.

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the answer of respondent, testimony and other evidence taken before an examiner of the Commission theretofore duly designated by it in support of the allegations of said complaint and in opposition thereto, briefs filed herein, and oral arguments by P. C. Kolinski, Counsel for the Commission, and by L. R. Krein, Counsel for the respond-

ent, and the Commission having made its findings as to the facts and conclusion that said respondent has violated the provisions of the Federal Trade Commission Act:

It Is Ordered that the respondent, Bunte Brothers, Inc., a corporation, its officers, directors, agents, representatives and employees, in the offering for sale, sale and distribution of candy, in the State of Illinois, do cease and desist from:

(1) Selling and distributing to dealers candy or other confections so packed and assembled that sales of such candy or other confections to the general public are to be made or may be made by means of a lottery, gaming device or gift enterprise;

(2) Supplying to or placing in the hands of dealers assortments of candy or other confections which are used or which may be used without alteration or rearrangement of the contents of such packages or assortments to conduct a lottery, game of chance or gift enterprise in the sale and distribution of candy or other confections contained in said assortments;

(3) Packing or assembling in the same assortment of candy for sale to the public at retail, pieces of candy of uniform size and shape with different colored centers, together with larger pieces of candy, which said larger pieces of candy are to be given as prizes to the purchasers procuring pieces of candy with centers of particular colors.

It Is Further Ordered that the respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

By the Commission.

(signed) Otis B. Johnson,
Secretary.

(Seal)

Endorsed: In the United States Circuit Court of Appeals. * * (Caption—6792) * *. Petition to Review. Filed Nov. 5, 1938. Frederick G. Campbell, Clerk. Samuel G. Clawson, Attorney at Law, 105 West Adams Street, Phone Randolph 8894, Chicago.

2 UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

In the Matter of
Bunte Brothers, Inc. a corporation.. } Docket No. 2695.

COMPLAINT.

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to Create a Federal Trade Commission, to define its powers and duties and for other purposes", the Federal Trade Commission, having reason to believe that Bunte Brothers, Inc., a corporation, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said Act of Congress, and it appearing to said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

Paragraph One: Respondent is a corporation organized under the laws of the State of Illinois with its principal office and place of business located in the City of Chicago, State of Illinois. It is now and for several years last past has been engaged in the manufacture of candies and in the sale and distribution thereof to wholesale dealers and jobbers and to retail dealers located at points in the states of the United States and causes the said products, when so sold, to be transported from its principal place of business in the City of Chicago, Illinois, to purchasers thereof in the State of Illinois, and to purchasers in other states of the United States at their respective places of business; the candy manufacturing industry in the United States represents a capital investment in excess of $150,000,000, with an annual value of product exceeding $250,000,000; most of the product of the industry is known in its trade circles as "straight goods" but a further distinguishing feature is the maintenance and promotion of certain widely known and nationally advertised items or "lines" for which the consuming public of the country maintains a consistent demand and which articles consequently form a defined current of commerce throughout the several states of the Union. The straight goods and

nationally advertised lines are not sold, nor designed to be sold, under a plan constituting a lottery or involving an element of chance, as hereinafter set forth. In the course and conduct of said business, respondent is in competition with other corporations and with individuals and partnerships located in the various states of the Union other than the State of Illinois, who are engaged in the manufacture, sale and distribution of said straight goods and nationally advertised lines in commerce between and among the various states of the United States, and particularly from the states of their domicile to the State of Illinois.

Paragraph Two: In the course and conduct of its business, as described in Paragraph One hereof, the respondent sells to wholesale dealers and jobbers and to re-
3 tail dealers in the State of Illinois certain packages or assortments of candies. The said assortments of candies are composed of a number of caramels of uniform size, shape, and quality each contained within a wrapper together with a number of larger pieces of candy, which larger pieces of candy are to be given as prizes to purchasers of said caramels in the following manner:

The majority of the said caramels in said assortments have the same color, but a small number of said caramels have a different color. The said pieces of candy of uniform size, shape, and quality in said assortment retail at the price of 1¢ each, but the purchasers who procure one of said candies having a color different from the majority of said candies are entitled to receive and are to be given free of charge one of the said larger pieces of candy heretofore referred to. The purchaser of the last piece of aforesaid caramel candy of a uniform size, shape, and quality in each of said assortments is entitled to receive and is to be given free of charge one of the larger pieces of candy heretofore referred to. The color of said caramels is effectively concealed from purchasers and prospective purchasers until a selection has been made and the wrapper removed. The aforesaid purchasers of said candies who procure a candy having a color different from the majority of said pieces of candy in said assortments thus procure one of the said larger pieces of candy wholly by lot or chance.

Paragraph Three: The wholesale dealers and jobbers referred to in Paragraph Two hereof, to whom respondent sells its assortments, resell said assortments of candy to retail dealers in the State of Illinois and said retail dealers and the retail dealers to whom respondent sells direct expose said assortments for sale and sell said candy

to the purchasing public in accordance with the aforesaid sales plan. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of its products in accordance with the sales plans hereinabove set forth, as a means of inducing purchasers thereof to purchase respondent's said product in preference to candy offered for sale and sold by its competitors.

Paragraph Four: The sale of said candy to the purchasing public as above alleged involves a game of chance or the sale of a chance to procure larger pieces of candy. Respondent's said assortments are handled by many retail dealers located in the vicinity of schools attended by children whose patronage is attracted by the element of chance involved in the sales plan. Such practices are a sort long condemned by the common law and criminal statutes; the sale of such and similar assortments in interstate commerce has been declared unlawful by the Supreme Court of the United States and orders have been issued by this Commission restraining competitors of respondent from the use of the same and similar methods in connection with their sales in interstate commerce.

By reason of said facts, many persons, firms and corporations located in the several states and engaged in selling and shipping into the State of Illinois straight goods and nationally advertised lines of candy in competition with respondent are under a moral and legal compulsion not to adopt such practices and do refrain from adopting them, and many reluctantly yield to the practice to
4 avoid the loss of their business. The use of said method by respondent gives it an undue preference in the candy traffic and operates unjustly against those competitiors of respondent who are required to refrain from the use of such method.

Paragraph Five: Many dealers in and ultimate purchasers of candy are attracted by respondent's said method and manner of packing said candy and by the element of chance involved in the sale thereof in the manner above described, and are thereby induced to purchase said candy so packed and sold by respondent and to purchase their other candy requirements from respondent in preference to candies offered for sale and sold by said competitors of respondent who do not use the same or equivalent methods.

Paragraph Six: The use of said method by respondent has the tendency and capacity unfairly, and because of said game of chance alone, to divert to respondent trade and custom from its said competitors in interstate com-

merce who do not use the same or equivalent methods; to exclude from said candy trade all competitors in such commerce who are unwilling to and who do not use the same or equivalent methods; to lessen competition in said candy trade, and to tend to create a monopoly of said candy trade in respondent and such other distributors of candy as use the same or equivalent methods, and to deprive the purchasing public of the benefit of free competition in said candy trade. The use of said method in the State of Illinois by respondent has a direct, dominant, burdensome and retarding effect upon the normal flow of interstate commerce in "straight goods" and nationally advertised "lines" of candies heretofore described, moving from other States of the Union into the State of Illinois by reducing shipments in interstate commerce to the State of Illinois of such candies; retarding the normal increase in volume of such goods shipped in interstate commerce to the State of Illinois; and in some instances causing a complete cessation of interstate movement of certain "lines" of "straight goods" sought to be shipped in interstate commerce to the State of Illinois. The use of said method by respondent has the tendency and capacity unfairly to eliminate from said candy trade in the State of Illinois all actual competitors from other States of the Union who sell and ship candy into the State of Illinois and to exclude therefrom all competitors who do not adopt and use said methods or equivalent methods.

Paragraph Seven: The aforementioned method, acts and practices of the respondent are all to the prejudice of the public and of respondent's competitiors as hereinabove alleged. Said method, acts and practices constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress, entitled "An Act to Create a Federal Trade Commission, to define its powers and duties, and for other purposes", approved September 26, 1914.

Wherefore, The Premises Considered, the Federal Trade Commission, on this 29th day of January, A. D. 1936, here issues its complaint against said respondent.

Notice.

Notice is hereby given you, Bunte Brothers, Inc., respondent herein, that the 6th day of March, A. D. 1936, at 2:00 o'clock in the afternoon, is hereby fixed as the time, and the offices of the Federal Trade Commission in the City of Washington, D. C., as the place,

when and where a hearing will be had on the charges set forth in this complaint, at which time and place you will have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violation of the law charged in the complaint.

You are notified and required, on or before the twentieth day after service upon you of this complaint, to file with the Commission an answer to the complaint. If answer is filed and if your appearance at the place and on the date above stated be not required, due notice to that effect will be given you. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule V) provide as follows:

(a) In case of desire to contest the proceeding the respondent shall, within 20 days from the service of the complaint, file with the Commission an answer to the complaint. Such answer shall contain a short and simple statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state.

* * * * * *

(c) Failure of the respondent to file answer within the time above provided and failure to appear at the fixed time and place of hearing shall be deemed to authorize the Commission, without further hearing or notice to respondent, to proceed in regular course on the charges set forth in the complaint and make, enter, issue, and serve upon respondent findings of fact and an order to cease and desist.

(d) In case respondent desires to waive hearing on the charges set forth in the complaint and not to contest the proceeding, the answer may consist of a statement that respondent admits all the material allegations of the complaint to be true. Any such answer shall be deemed to waive a hearing thereon, and to authorize the Commission, without trial and without further evidence, or other intervening procedure, to make, enter, issue and serve upon respondent;

(1) In cases arising under Section 5 of the Act of Congress approved September 26, 1914, entitled "An Act to Create a Federal Trade Commission, to define its powers and duties, and for other purposes" (the Federal Trade Commission Act)

* * * * * *

findings of fact and an order to cease and desist from the violations of law charged in the complaint.

6 In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary, and its official seal to be hereto affixed at Washington, D. C., this 29th day of January, A. D. 1936.

By the Commission

Otis B. Johnson,
Sercetary.

(Seal)

7 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—2695) * *

ANSWER OF BUNTE BROTHERS, INC. TO THE COMPLAINT OF FEDERAL TRADE COMMISSION.

Filed February 19, 1936.

Comes now the respondent, Bunte Brothers, Inc., a corporation, and for answer to the complaint filed by Federal Trade Commission in the above entitled matter, states the following:

Paragraph One: Your respondent admits that it is a corporation organized and existing under the laws of the State of Illinois with its principal office and place of business located in the City of Chicago, State of Illinois, and further answering admits that for the several years last past it has been engaged in the manufacture of candies and in the sale and distribution thereof to wholesale dealers and jobbers and to retail dealers located in the various states of the United States. As to whether the candy manufacturing industry in the United States represents a capital investment in excess of $150,000,000, with an annual value of product exceeding $250,000,000, your respondent is not advised and neither admits nor denies the allegation. Your respondent further answering neither admits nor denies that most of the product of the industry is known in its trade circles as "straight goods".

Your respondent does deny that the consuming public of the United States maintains a consistent demand for certain widely known and nationally advertised items or "lines", which said items or "lines" form a defined current of commerce throughout the several states of the Union.

Your respondent further answering neither admits nor denies, nor is your said respondent advised, except as so

stated in the complaint filed herein, that certain straight goods and nationally advertised lines are not sold, nor designed to be sold, under plans constituting lotteries or involving elements of chance as mentioned in said complaint.

Your respondent further answering admits that in certain types of goods manufactured by your respondent it does enter into competition with other candy manufacturers in the various states of the United States, but emphatically denies that it is in competition in interstate commerce with candy manufacturers outside of the State of Illinois with certain types of merchandise manufactured by your respondent and sold only within the boundaries of the State of Illinois.

8 Paragraph Two: Your respondent further answering admits that it sells to wholesale dealers and jobbers and to retail dealers in the State of Illinois certain packages and/or assortments of candies, which can or may be displayed and sold to the retail public in such a manner that the person making a purchase of one of the individual pieces of candy may by such purchase be placed in a position to receive a chance of obtaining a larger and more valuable piece of candy for the original purchase price. Your respondent does deny, however, that the description of said merchandise as set forth in Paragraph Two of said complaint, purporting to be the type of merchandise sold by your said respondent, is true and correct.

And your respondent further answering denies that any of the type of merchandise as set forth in Paragraph Two of this answer is sold to any person or persons, partnerships and/or corporations, or anyone outside of the boundaries of the State of Illinois, nor is such type of merchandise sold to any person or persons, partnerships and/or corporations with the intent that said type of merchandise should in any manner or form enter into any channel of commerce which should result in the shipment of said merchandise being in interstate commerce.

Paragraph Three: Your respondent further answering neither admits nor denies, and is not informed by what manner or method the merchandise as described in Paragraph Two of this answer is sold to the purchasing public, and your respondent denies that it in any manner or form supplies to and places in the hands of others the means of conducting lotteries in the sale of its products, and denies that any sales plan or method has been conceived with that end in view, and further denies that it is a party to any plan or method to induce the purchase of its candies in

preference to candy offered for sale by any other person or persons, partnerships or corporations.

Paragraph Four: Your respondent further answering admits, as set forth in Paragraph Two of this answer, to the sale under the confines of the boundaries of the State of Illinois of the type of merchandise referred to in said Paragraph Two of this answer, and by this denies that it has violated any law of the State of Illinois or any ordinance of any city or village in said State of Illinois. Your respondent further answering denies that its said merchandise is sold in the vicinity of schools attended by children whose patronage is attracted by any element of chance, and further denies that it has by any act or deed been a party to any practice which has been condemned by the common law and criminal statutes, and further answering denies that it is or has been engaged in the sale of any of its said merchandise either in interstate or intrastate commerce, which has been declared unlawful by the Supreme Court of the United States, and further denies that it has been engaged in any sale of its said merchandise which is or has been in violation of any order or orders issued by this Honorable Commission.

Your respondent further answering denies that any person or persons, firm or corporation located in any of the several states and engaged in selling and shipping their merchandise into the State of Illinois are compelled to violate any law of the land or order of this Honorable Commission by any act or deed by this respondent in the sale of its said merchandise either in interstate commerce or within the boundaries of the State of Illinois. Your
9 respondent further answering denies that it is engaged in any method or plan of the sale of the candies so manufactured by it which in any manner or form gives it an undue preference in the candy traffic and further denies that it is engaged in any plan or method of sale of its said candies which operates unjustly against any person or persons, partnerships and/or corporations engaged in the same type of business,

Paragraph Five: Your respondent further answering states that Paragraph Five of the complaint filed herein is so vague and indefinite that your respondent is not advised as to whether or not the complaint refers to matters engaged in by your respondent in interstate commerce or matters engaged in wholly in the sale of its merchandise within the State of Illinois. Therefore, in answer to Paragraph Five, your respondent denies each and every allegation therein contained.

Paragraph Six: Your respondent further answering, as so many times aforementioned, denies that it is engaged in any method or plan which has the tendency and capacity of being unfair, and denies that it diverts to its trade by its said methods any business of any person or persons, partnerships and/or corporations engaged in interstate commerce, and denies that it excludes from said candy trade any competitors in such commerce who are unwilling to and who do not use its said methods, and denies that it by any manner or form or method lessens competition in said candy trade, and denies that it tends to create a monopoly of said candy trade, and further denies that it in any manner or form deprives the purchasing public of the benefit of free competition in said candy trade. Your respondent further answering states that the business conducted by it within the State of Illinois is not in violation of any law of the State of Illinois or of any law of the land, and that it does not in any manner or form direct, dominate, burden and/or retard the normal flow of interstate commerce of any goods or commodities whatsoever in the candy trade moving from other States of the Union into the State of Illinois, and denies that it is engaged in any method or practice that in any way reduces shipments in interstate commerce to the State of Illinois of any commodities manufactured and sold in the candy trade, and further denies that any increase in volume of any such goods or commodities shipped in interstate commerce to the State of Illinois is retarded by any act of your said respondent. Your respondent further denies that it has in any manner or form compelled a cessation of interstate movement of any goods or merchandise sold by any person or persons, partnerships, and/or corporations engaged in the candy trade sought to be shipped in interstate commerce to the State of Illinois. Your respondent further denies that it is engaged in any method that has the tendency and capacity to unfairly eliminate from said candy trade in the State of Illinois any person or persons, partnerships and/or corporations who may desire to ship their said merchandise into the State of Illinois, and does not exclude any of said person or persons, partnerships and/or corporations by any of its said methods or practices.

Paragraph Seven: Your respondent denies that it is engaged in any method, act or practice which is now or has been in any manner or form a prejudice to the public, as set forth in said complaint, and your respondent further denies that any of its said methods, acts or practices constitute any unfair method of competition in commerce with-

in the intent and meaning of Section 5 of an Act of
10 Congress, entitled "An Act to Create a Federal Trade Commission, to define its powers and duties, and for other purposes", approved September 26, 1914.

Wherefore, your respondent, having fully answered the said complaint of the Federal Trade Commission insofar as it is advised, denies that the said Commission is entitled to the relief as set forth in said complaint, or any part thereof, and asks that said complaint be dismissed by reason of the fact that it is without jurisdiction, as is apparent from the facts as set forth in the complaint, and that said respondent be dismissed without further costs.

(Signed) Bunte Brothers, Inc.
(Signed) F. A. Bunte,
Vice-Pres.

11 UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 20th day of March, A. D., 1937.

Commissioners:

William A. Ayres, Chairman.
Garland S. Ferguson, Jr.
Charles H. March.
Ewin L. Davis.
Robert E. Freer.

* * (Caption—2695) * *

ORDER APPOINTING EXAMINER AND FIXING TIME AND PLACE FOR TAKING TESTIMONY.

This matter being at issue and ready for the taking of testimony, and pursuant to authority vested in the Federal Trade Commission, under an Act of Congress (38 Stat. 717; 15 USCA, Section 41),

It Is Ordered that Miles J. Furnas, an examiner of this Commission, be and he hereby is designated and appointed to take testimony and receive evidence in this proceeding and to perform all other duties authorized by law;

It Is Further Ordered that the taking of testimony in this proceeding begin on Friday, April 16, 1937, at ten

o'clock in the forenoon of that day (central standard time) in Room 1123, New Post Office Building, Chicago, Illinois.

Upon completion of testimony for the Federal Trade Commission, the examiner is directed to proceed immediately to take testimony and evidence on behalf of the respondent. The examiner will then close the case and make his report.

By the Commission:

(Seal) Otis B. Johnson.

12 UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 21st day of July, A. D., 1937.

Commissioners:

William A. Ayres, Chairman.
Garland S. Ferguson, Jr.
Charles H. March.
Ewin L. Davis.
Robert E. Freer.

* * (Caption—2695) * *

Whereas, Miles J. Furnas, an examiner of this Commission, was heretofore appointed to take testimony and receive evidence in this proceeding, pursuant to authority vested in the Federal Trade Commission under an Act of Congress (38 Stat. 717; 15 USCA, Section 41), and whereas, there is a hearing scheduled in the above proceeding on Saturday, July 24, 1937, at 9 o'clock in the forenoon of that day (central standard time), in Room 1123, New Post Office Building, Chicago, Illinois, and whereas, the said Miles J. Furnas, by reason of other duties to perform will be unable to continue therein,

It Is Therefore Ordered that Irving D. Royal, an examiner of this Commission, be and he hereby is designated and appointed to take testimony and receive evidence in this proceeding in the place and stead of Miles J. Furnas, on the above mentioned date and place.

By the Commission,

Otis B. Johnson,

(Seal) Otis B. Johnson,
Secretary.

13 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—2695) * *

MOTION.

Now comes the respondent Bunte Brothers, Inc. by Samuel G. Clawson, its attorney, and respectfully moves as follows:

1. That this Honorable Commission enter an order in this proceeding directing that all hearings in this cause be held in the offices of this Commission located in the City of Chicago, Illinois;

2. That this Honorable Commission enter an order herein directing Irving D. Royal, an examiner of this Commission, or any other examiner to which this case is referred, not to hold hearings in this case except at the offices of this Commission located in Chicago, Illinois;

3. That this Honorable Commission enter an order herein directing said Irving D. Royal, an examiner of this Commission, or any other examiner to which this cause
14 may be referred, not to hold a hearing in this cause on October 2, 1937 in St. Louis, Missouri; and

4. That this Honorable Commission enter an order herein sustaining the objections made by the respondent to the motion of counsel for this Commission made on the 27th day of July, 1937 that a hearing be held in this cause in St. Louis, Missouri on the 2nd day of October, 1937, and reversing the ruling of the trial examiner that said objections be overruled and that said motion be granted.

Bunte Brothers, Inc.,
By Samuel G. Clawson,
Its Attorney.

The respondent, Bunte Brothers, Inc. by Samuel G. Clawson, its attorney, in support of said Motion respectfully represents unto this Honorable Commission as follows:

1. That by reason of issues raised by the Complaint filed by this Commission on or about January 29, 1936, and the Answer of the respondent filed herein subsequent
15 thereto, several hearings of the above-entitled proceeding have been held prior to the date hereof in the City of Chicago, State of Illinois; that on July 27, 1937, at the conclusion of the hearing held in Chicago, Illinois before

Irving D. Royal, an examiner of this Commission, said examiner ordered a hearing in this cause to be held on October 2, 1937 in St. Louis, Missouri, to which action counsel for the respondent duly objected and stated his reasons therefor, and the objection being overruled counsel duly excepted; your petitioner is informed and believes and on the basis thereof states the fact to be that a further hearing in this cause is contemplated to be held in New York City, New York on October 18, 1937;

2. That the purpose of this proceeding is to prevent the respondent, an Illinois corporation, from selling and distributing in Illinois, from its factory located in Illinois, so-called penny "break-and-take" assortments; the Answer of the respondent to the Complaint filed herein by this Commission, among other things, denied the jurisdiction of this Commission to enter such an order; all of the acts complained of by this Commission in said Complaint take place in the State of Illinois by the respondent, a corporation domiciled in the City of Chicago, State of
16 Illinois and having its factory and principal place of business in the City of Chicago, State of Illinois;

3. That the respondent at all the hearings in this cause, by reason of the technical nature of the subject matter, at the request of its counsel, has had one of its officers present in order to assist its counsel in more fully understanding the testimony; that counsel for the respondent believes such assistance is indispensable at all the hearings in this proceeding; that the respondent would incur expenses and the loss of the services of one of its officers for a considerable period of time if hearings were attended outside the City of Chicago, State of Illinois which it would not incur if the hearings were held in said City and State; that your petitioner believes and on the basis thereof states the fact to be that all of the persons that will be called upon to testify against the respondent in the hearings ordered or contemplated to be held outside of the State of Illinois, as aforesaid, are employed by or are officers of companies doing business, and having representatives in, the City of Chicago, State of Illinois; that the failure to call such representatives who are in the City of Chicago, State of Illinois and requiring the respondent and its counsel to
17 attend hearings outside of this State, under these circumstances, is in the opinion of your petitioner unfair, arbitrary and oppressive to the respondent; that by reason of the purely intrastate nature of the proceeding and by reason of the foregoing, the respondent feels that any

hearing held outside of the offices of this Commission in the City of Chicago, State of Illinois would be unreasonable and would deprive respondent of due process of law.

Bunte Brothers, Inc.,
By Samuel D. Clawson,
Its Attorney.
105 W. Adams Street,
Chicago, Illinois.

State of Illinois }
County of Cook } ss.

Samuel G. Clawson being first duly sworn on oath deposes and says that he has read the above and foregoing motion by him subscribed and knows the contents thereof and that the same is true in substance and in fact, except as to those matters and things therein alleged upon information and belief, and as to those he believes them to be true.

Samuel D. Clawson.

Subscribed and sworn to before me this 25th day of September, A. D. 1937.

Florence M. Comar,
Notary Public.

(Seal)

18 UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 29th day of September, A. D. 1937.

Commissioners:

William A. Ayres, Chairman.
Garland S. Ferguson, Jr.
Charles H. March.
Ewin L. Davis.
Robert E. Freer.

* * (Caption—2695) * *

ORDER DENYING MOTION THAT NO HEARINGS BE HELD OUTSIDE THE STATE OF ILLINOIS.

This matter coming on to be heard by the Commission upon the motion of counsel for the respondent, filed September 27, 1937, requesting that the Commission enter an order directing that all hearings in this cause be held in the offices of this Commission located in the City of Chicago, State of Illinois, and the Commission having duly considered the said motion, and the record, and being now fully advised in the premises;

It Is Ordered that the motion of counsel for respondent that the Commission enter an order directing that all hearings in this cause be held in the offices of the Commission located in the City of Chicago, State of Illinois, be and the same hereby is, denied.

By the Commission.

Otis B. Johnson,
Secretary.

(Seal)

19 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—2695) * *

EXCEPTION.

Filed September 30, 1937.

Now comes the respondent, Bunte Brothers, Inc. by Samuel G. Clawson, its attorney, and respectfully excepts to the order of this Honorable Commission entered herein on the 29th day of September, 1937, denying the motion of the respondent heretofore filed herein dated September 25, 1937.

Bunte Brothers, Inc.
By: Samuel G. Clawson,
Its Attorney.
105 West Adams Street,
Chicago, Illinois.

20 UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission held at its office in the City of Washington, D. C., on the 26th day of November, A. D. 1937.

Commissioners:

William A. Ayres, Chairman.
Garland S. Ferguson, Jr.
Charles H. March.
Ewin L. Davis.
Robert E. Freer.

* * (Caption—2695) * *

SUBSTITUTE ORDER APPOINTING EXAMINER AND FIXING TIME AND PLACE FOR TAKING TESTIMONY.

Whereas, Miles J. Furnas, an examiner of this Commission was heretofore appointed to take testimony and receive evidence in this proceeding, pursuant to authority vested in the Federal Trade Commission under an Act of Congress (38 Stat. 717; 15 USCA, Section 41), and whereas, there is a hearing scheduled in the above proceeding on

Thursday, December 2, 1937, at ten o'clock in the forenoon of that day (central standard time), in Room 1123, New Post Office Building, Chicago, Illinois, and whereas, the said Miles J. Furnas by reason of other duties to perform will be unable to continue therein,

It Is Therefore Ordered that W. W. Sheppard, an examiner of this Commission, be and he hereby is designated and appointed to take testimony and receive evidence in this proceeding in the place and stead of Miles J. Furnas on the above mentioned date and place.

By the Commission.

Otis B. Johnson,
Otis B. Johnson,
Secretary.

(Seal)

21 UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 11th day of January, A. D., 1938.

Commissioners:

Garland S. Ferguson, Jr., Chairman.
Charles H. March.
Ewin L. Davis.
William A. Ayres.
Robert E. Freer.

* * (Caption—2695) * *

SUBSTITUTE ORDER APPOINTING EXAMINER AND FIXING TIME AND PLACE FOR TAKING TESTIMONY.

Whereas, Miles J. Furnas, an examiner of this Commission, was heretofore appointed to take testimony and receive evidence in this proceeding, pursuant to authority vested in the Federal Trade Commission under an Act of Congress (38 Stat. 717; 15 USCA, Section 41), and whereas, there is a hearing scheduled in the above proceeding on Monday, January 17, 1938, at two o'clock in the afternoon of said day (central standard time), in room 1123 New Post Office Building, Chicago, Illinois, and whereas the said Miles J. Furnas, by reason of other duties to perform, will be unable to continue therein

It Is Therefore Ordered that John H. Bass, an examiner of this Commission, be and he hereby is designated and appointed to take testimony and receive evidence in this proceeding in the place and stead of Miles J. Furnas, on the above mentioned date and place.

By direction of the Commission:

Otis B. Johnson,
Otis B. Johnson,
Secretary.

(Seal)

24 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—2695) * *

Room 1123, New Post Office Building,
433 West Van Buren Street,
Chicago, Illinois,
April 16, 1937.

Met, pursuant to notice, 11 a. m.

Before:

Miles J. Furnas, Examiner.

Appearances:

P. C. Kolinski, attorney for the Federal Trade Commission.

Mr. Samuel G. Clawson, by

Mr. LeRoy Krein, appearing for respondent.
(105 West Adams Street, Chicago, Illinois.)

25 PROCEEDINGS.

Examiner Furnas: This hearing is convened and will now be in order in the matter of the proceedings of the Federal Trade Commission against Bunte Brothers, Inc., Docket No. 2695, scheduled by order of the Commission for hearing in the city of Chicago, Illinois, in Room 1123, New Post Office Building, at 11 a. m. on the 16th day of April, 1937; Mr. P. C. Kolinski appearing as counsel for the Commission present, and Mr. Leroy R. Krein counsel for the respondent.

The respondent in this proceeding is charged with having violated Section 5 of the Federal Trade Commission Act.

If you desire a copy of these proceedings it will be

necessary to make your arrangements with the reporter here, who is not an employee of the Commission or the government.

You may proceed.

Mr. Krein: Your Honor, I should like at this time to file the appearance of Samuel G. Clawson for the respondent. I am appearing as an associate of Mr. Clawson.

Examiner Furnas: It will be received.

(Thereupon three copies of such appearance were handed to the reporter.)

Examiner Furnas: You may proceed.

26 Mr. Kolinski: In this proceeding, your Honor, respondent filed an answer on February 19, 1936. The answer raises certain issues which will call for the taking of testimony and at this time I call Mr. Ferdinand A. Bunte, vice-president of the respondent corporation, as a witness.

FERDINAND A. BUNTE was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Kolinski.

Q. You are the vice-president of Bunte Brothers, Incorporated?

A. I am.

Q. That is a corporation organized under the laws of what state?

A. Illinois.

Q. When was it chartered as a corporation?

A. I believe in 1903.

Q. The office and principal plant of the corporation is located where?

A. In Chicago.

Q. What address?

A. 3301 Franklin Boulevard.

Q. In what business is the respondent engaged?

A. Manufacturing confectionery.

Q. What is the line of confectionery that your

27 company manufactures? Describe it fully.

A. All types of confectionery.

Q. Name just a few of the classifications.

A. Hard candies; chocolates, in bulk, packages, bars, and other types of candies in packages, bulk and bars;

chocolates in penny goods and other types of candies in penny goods.

Q. That product is all manufactured in the city of Chicago?

A. Yes, sir.

Q. And what types of customers do you have?

A. Wholesale and retail.

Q. And where are they located?

A. All over the world.

Q. In the state of Illinois do you sell it to wholesale and retail customers?

A. Yes.

Q. Can you tell us approximately how many such outlets you have?

A. In Illinois?

Q. Approximately, in Illinois.

A. I cannot.

Q. Would you give a close approximation?

A. No, I cannot.

Mr. Kolinski: This is off the record.

(There was a discussion off the record.)

Examiner Furnas: On the record.

28 By Mr. Kolinski:

Q. What proportion of the retail outlets in the state of Illinois displays your company's products for sale?

A. I can safely say fifty per cent.

Q. You would say that at least fifty per cent of the retail outlets for candy products in the state of Illinois handle your company's products?

A. Yes.

Q. Now, do some non-independent outlets which we will designate as chains carry your products?

A. Yes.

Q. Do most of them carry your products?

A. Most of whom?

Q. The chains?

A. No.

Q. But do some of the large chains carry Bunte products?

A. Yes.

Q. What is the capitalization of your organization?

A. $1,000,000.00.

Q. And how many directors are there?

A. Five.

Q. Will you name them, please?

A. Mr. Theodore W. Bunte, Mr. Harry Irwin, Mr. Andrew Wiegland, Mr. S. Birdsaal and myself.

Q. Who is the president of the corporation?

29 A. Mr. Theodore W. Bunte.

Q. Is he also treasurer?

A. Yes.

Q. And you are the vice-president?

A. Yes.

Q. And the secretary is Mr. J. Birdsaal?

A. Mr. S. Birdsaal.

Q. S. Birdsaal. Your corporation is in competition with other individuals and corporations, and firms manufacturing and selling candy in the state of Illinois?

A. Yes.

Q. Some of these competitors in the state of Illinois are domiciled in states outside of Illinois, are they not?

A. I don't understand that question.

Q. Do some of your competitors having candy business in the state of Illinois reside elsewhere than in the state of Illinois?

Examiner Furnas: Are their factories located, their plants or factories located outside of the state of Illinois?

The Witness: That isn't quite clear to me.

Mr. Kolinski: I will try to put the question more clearly, if possible.

By Mr. Kolinski:

Q. Are some of your competitors in the candy busi-

30 ness in the state of Illinois, those with whom you compete, business individuals and firms who are located in other states of the union?

A. Yes.

Q. There are a considerable number of those?

A. Yes.

Q. Do you know approximately the capital investment in the candy business in the United States?

A. The only figures I have ever seen were in the complaint issued by the Commission, and which I understand was taken from the Code for the confectionery manufacturing industry, and it states that the capital investment of the industry may safely be stated to be in excess of—

Examiner Furnas: Well, please do not read that. Just give it in your own words.

The Witness: All right. $150,000,000.00 is the answer to the question.

By Mr. Kolinski:

Q. And approximately what is the annual profit of the industry?

A. In excess of $250,000,000.00.

Q. From your own knowledge of the candy business, are those figures practically correct?

A. I believe they are.

Q. You are acquainted with figures released from
31 time to time by the Department of Commerce of the Federal Government?

A. Yes.

Q. On the basis of that information, you would say those figures are substantially correct?

A. Yes.

Q. Your company was organized originally to engage in the candy industry in what year?

A. 1876.

Q. And how long have you personally been in the candy business?

A. Twenty-five years.

Q. You know what a nationally advertised candy is?

A. Yes.

Q. Give a brief description of a nationally advertised line of candies?

A. Our own.

Q. Do you know of any others?

A. Do you want me to name them, by company name?

Q. Yes, name some.

A. The Stephen Whitman Company of Philadelphia; the Mars Company of Chicago and Bunte Brothers.

Q. Do you consider the product of Luden's, Inc. of Pennsylvania a nationally known line?

A. Luden's, Inc. of Reading, Pennsylvania nationally advertise their cough drops, which have been classi-
32 fied as medicinal by the United States Department of Agriculture.

Q. The same thing would hold then for Smith Bros., Inc.?

A. Right.

Q. Would you consider Frank H. Fleer Company of Philadelphia with their bubble gum a nationally known line?

A. I do not classify gum as confectionery.

Q. You would not call it a confection?

A. No. It was not under our code.

Q. But it is sold in confectionery stores?

A. Yes.

Q. And in all part of outlets where your goods is sold?

A. Yes.

Q. So it is a directly competing product?

A. I have never considered it such.

Q. You never have. Would you consider the line of Peter Pauls, New Haven, Connecticut, a nationally advertised line?

A. That is Naugatuck, Connecticut, to be correct. No.

Q. And the line of the F. M. Paist Company?

A. I have never heard of that company.

Q. And the line of the New England Confectionery Company?

A. They are not a national advertiser.

Q. And the line of George Close and Company?

A. Not a national advertiser.

Q. But the lines of the last three named companies do appear in the state of Illinois for the purposes of sale
33 though, do they not?

A. I have seen the New England Confectionery Company's product for sale in Illinois, but to the best of my knowledge, I have never seen the product of Close and Company.

Q. But there are then some nationally advertised lines of confectionery products made elsewhere in the United States which are marketed in the state of Illinois?

A. Yes.

Q. And your company, for the Illinois business, is in competition with those concerns?

A. Being on the home ground in Illinois, I would say that the question should be reversed.

Q. In other words, your answer would be they are in competition with you?

A. Yes.

Q. For business in the state of Illinois?

A. Yes.

Q. That is an interesting way of reaching the same results. Your candy sales in the state of Illinois are made to wholesalers and to retailers?

A. Yes.

Q. You are familiar with the distinction in the trade between what is known as straight candies and assortments or deal candy?

A. I am acquainted with the interpretation that the
34 Trade Commission has established since its investigation on candy.

Q. And when you refer to what is known as deal or break-and-take candies or assortment candies, you are familiar with what that designates?

A. I am not familiar with the word "deal." I am with "break-and-take."

Q. Will you describe a break-and-take assortment generally, just a general definition?

A. It is an assortment of candies consisting of items to be purchased, with different colored centers or other identification, thereby establishing the right to receive a larger portion of candy, should one or the other color be declared the winner.

Q. Does your company manufacture and sell in Illinois such break-and-take assortments?

A. Yes.

Q. How long have you sold such assortments in the state of Illinois?

A. I would say almost as long as break-and-takes have been known in Illinois.

Q. In terms of years, how long would that be?

A. I am not familiar with that.

By Examiner Furnas:

Q. Ten years?

A. Well, just, I don't know whether we had them before the war or not and I had about a four year lapse in the army, and I don't know whether it was that far back or not.

By Mr. Kolinski:

Q. To your best knowledge, the break-and-take assortments have been sold in Illinois since the world war period?

A. Or there abouts.

Q. Yes. Approximately the last fifteen or twenty years?

A. I would say fifteen years.

Q. Fifteen years. And during that portion of that fifteen years has your company sold them in Illinois?

A. Nearly all of that time.

Q. At the time the complaint was issued in this proceeding on January 29, 1936, you were selling break-and-take assortments in the state of Illinois?

A. Yes.

Q. And you are selling such assortments today?

A. Yes.

Q. Are you familiar with a firm known as M. J. Cohn Company?

A. Yes.

Q. On West Austin Avenue, Chicago?

A. Yes.

Q. Do you sell them your company's products?

A. Yes.

Q. Did you on about the 27th of July, 1935 have for sale a break-and-take assortment known as "Summer Bar Assortment"?

36 A. Yes.

Q. I show you a circular which tends to identify such an assortment, does it not? (Handing document to witness.)

A. Yes.

Q. This circular is entitled "Summer Bar Assortment"?

A. Yes.

Q. Below that appears the word "contents"?

A. Yes.

Q. And then the statement under that, "160 Caramels"?

A. Yes.

Q. And below that the statement "16 chocolate caramels"; below that "144 vanilla caramels"; in the next line "16-5¢ assorted bars"; and in the last line "1-25¢ box of candy."

Now, will you describe what that numerical relation as set forth means?

A. That is a circular showing the contents of the box, what was inside of the box when it left the factory.

Q. And that box contained what?

A. As stated there.

Q. It contained 160 caramels?

A. And 16-5¢ assorted bars and 1-25¢ box of candy.

Q. And were all of the 160 caramels of the same flavor or color?

A. No.

Q. What variation was there?

37 A. There were 144 vanilla centered caramels and 16 chocolate centered caramels.

Q. The outside of all of the 160 caramels was uniform in color, was it?

A. No.

Q. Well, there was an opaque wrapper on each caramel?

A. Yes.

Q. So that it would be impossible for the prospective consumer in picking one of the 160 caramels to know which was a chocolate caramel or which was a vanilla caramel until he unwrapped it, is that right?

A. Right.

Q. What was the purpose of the 16-5¢ assorted bars in this box?

A. The 16 assorted bars were given to the purchasers who selected the 16 chocolate caramels?

Q. And what was the retail price of the 160 caramels?

A. They were never sold, to the best of my knowledge, outside of this assortment.

Q. And in the assortment, at what price were they sold?

A. One cent each.

Q. Then the purchaser at one cent, of 16 chocolate caramels, received what, in addition for his money?

A. One 5-cent candy bar.

Q. Was the 5-cent candy bar the regulation sized
38 5-cent candy bar?

A. Yes, it was.

Q. Has that always been the case in the case of bars in assortments of this character?

A. With out merchandise it has.

Q. The 5-cent bar accompanying the assortment then differed from the caramels, it was a regulation 5-cent bar that was sold otherwise as straight goods?

A. I wouldn't say that the 5-cent bar here was always a piece of candy in one piece. It may have been a 5-cent package or assorted candies. You see what I mean?

Mr. Kolinski: Yes. This is off the record.

(There was a discussion off the record.)

By Mr. Kolinski:

Q. The last item marked 1-25¢ box of candy, what did that refer to?

A. That referred to a half pound, I believe, of assorted summer candies.

Q. And how was that disposed of?

A. The purchaser of the last caramel in the assortment received the 25-cent box of candy.

Q. Your company sold the assortment in Illinois which is identified by this circular, known as "Summer Bar Assortment"?

A. Yes.

Q. During the year 1935?

39 A. Yes.

Mr. Kolinski: Mr. Examiner, I offer in evidence as Commission's Exhibit 1 in this proceeding the circular just identified by the witness.

Examiner Furnas: Any objection.

Mr. Krein: No objection.

Examiner Furnas: It may be received and marked as Commission's Exhibit 1.

(The document referred to was marked "COMMISSION'S EXHIBIT 1," and received in evidence.)

By Mr. Kolinski:

Q. The character of these assortments varies according to season, does it not?

A. Yes.

Q. Just what variations are there?

A. Merchandise that will withstand the summer heat is used during the summer months.

Q. And caramels and bars lend themselves to summer use?

A. Yes.

Q. Creams and items of candy that might depreciate—

A. Chocolates.

Q. —and chocolates which might depreciate in hot or humid weather are more commonly used in assortments of this character during the cooler months of the year?

A. Yes.

40 Q. And the assortment is given a new name and probably a new package, but the principle is generally the same?

A. Yes.

Q. There is a count, a total count of units of 160 pieces and a certain smaller number which will vary of what are known as the winning pieces?

A. Yes.

Q. And they are accompanied by the prizes in an equal number and a large prize for the last pick?

A. Yes.

Q. Mr. Leo J. Wilk of South Halsted Street, is he one of your customers?

A. Yes.

Q. During the summer of 1935 did you sell what was known as a 25 bar assortment? I will identify it further; the contents were 160 caramels of which 135 were vanilla caramels, 25 were chocolate caramels and there were 25 5-cent assorted bars and one 25-cent box of candy in the assortment. Do you recall that?

A. Yes.

Q. At this time are you selling such type of break-and take assortment in the state of Illinois as this (indicating), bearing the name "Ta-ka Flyer" assortment?

A. Yes.

Q. Will you describe that assortment and its method of sale?

41 A. 160 chocolate creams, of which 140 have vanilla in flavor and white in color centers, 20 have orange in

flavor and orange in color centers, 20 assorted bars and 1-half pound box of assorted chocolates.

Q. This is sold to your customers wherever they are located in the state of Illinois?

A. Yes.

Q. And is eventually placed on display by retailers?

A. I suppose so.

Q. It is designed to be sold to ultimate consumers, is it not?

A. Yes.

Q. And in the sale to the ultimate consumers the entire assortment is displayed?

A. It must be, I imagine.

Q. The assortment consists primarily of a large box which contains all of the items, the 160 chocolate creams, the 20 assorted bars and the half pound box of chocolates?

A. Right.

Q. Is that right?

A. That is right.

Q. The 160 chocolate creams are packed in a separate smaller box contained in the larger box?

A. Right.

Q. And the external appearance of them is uniform?

42 A. Right.

Q. They are all chocolate coated?

A. Right.

Q. The prospective purchaser of such creams pays what price for them?

A. One cent each.

Q. Is there any way of him knowing whether the center of the cream will be white or orange colored?

A. I don't believe there is.

Q. When does he find that out?

A. By breaking them.

Q. And having broken one that contains the white center, does he receive anything additional for his money?

A. No.

Q. If he should procure one of the twenty in the entire group of 160 that is orange colored in the center, he received what?

A. A package of candy which is on display with the other merchandise.

Q. It is a part of the remainder of 20 assorted bars contained in the larger box?

A. Yes.

Q. And who procures the one half pound of chocolates?

A. The purchaser of the last of the 160 creams.

Q. These are sold by your company to all types of
43 customers that you have in the state of Illinois?

A. Yes, sir.

Q. And to your knowledge they appear for retail sale in all the retail outlets that your company serves in this state?

A. Those who buy them.

Q. What class of retail outlets buys these items?

A. I have no idea.

Q. You have no idea. Have you ever seen them in retail stores?

A. Yes, sir.

Q. In what type of stores have you seen them?

A. I have seen them in drug stores and cigar stores.

Q. And what other type of stores?

A. That is the only stores I know of that I go into.

Q. Do you ever go into any other type of stores?

A. Very seldom.

Q. So that you don't know whether they appear in neighborhood confectionery or stationery or grocery or school stores?

A. I couldn't say.

Q. The assortment is so packed and assembled as to be displayed for purposes of retail sale as one unit, is it not?

A. I believe that is customary.

Q. And to your knowledge, it is so displayed?

A. I have seen it displayed that way.

Q. You stated that the creams are not the regular
44 straight stock, they are not sold straight?

A. I don't know whether we pack these creams in five pound boxes or not. I believe we do.

Q. Which item in the assortment is it that does not come out of your straight stock?

A. Every thing in it, I believe, is packed for this assortment.

Q. It is made especially for this assortment?

A. Packed, not manufactured; packed for the assortment.

Q. Are any of the individual 20 assorted bars sold on the market separately as such bars?

A. Yes. Those are not bars, Mr. Kolinski, they are packages.

Q. Are any of the 20 packages called bars that accompany the Ta-ka Flyer bar assortment sold separately as such packages?

A. Not as they are packed for this assortment.
Q. What is the difference?
A. Most of the merchandise is packed special for this package, namely, the Ta-ka Flyer assortment, but the quality is all of the highest that can be manufactured.
Q. There is nothing of an inferior packaging or low priced material in this break-and-take assortment of the character that sometimes appears in the industry under the name of punch-board candy, is there?
A. This is not a punch-board assortment.
45 Q. The legend entitled "Ta-ka Flyer" bar assortment, which you identified, accompanies each assortment which is packed for shipment?
A. Yes.
Q. And it is displayed in connection with the assortment as a whole, is it not?
A. It isn't made as such. It is merely a descriptive circular.
Q. But it does describe the method of distribution of that merchandise?
A. No, it does not.
Q. Does how is the distribution effected then by the retailer?
A. I don't know.
Q. Are you asked by the retailer especially to make up this assortment?
A. Not by retailers. We are by wholesalers.
Q. Well, just how are you asked to make it up?
A. That they want a break-and-take assortment.
Q. And do you know what is meant when they ask you for a break-and-take assortment?
A. Yes.
Q. Just explain that fully, will you?
A. We know what is customary to manufacture for a break-and-take assortment.
Q. And these assortments would vary in name and
46 character from time to time, which you put out at the request of your trade, is that it?
A. Yes.
Q. And the request is communicated to you in such detail, in such terms that you understand it?
A. Yes.
Q. And when a retailer or when a customer asks you to put out a break-and-take assortment, do they specify the approximate number of prizes it should contain?
A. No.
Q. Who decides that?

A. We do, according to the season of the year that the package is turned out, what the contents shall be.

Q. And that has varied in the past two years from a prize content of sixteen pieces, as evidenced by exhibit 1, and in addition the box of candy for the last piece making a total of seventeen prizes in 160 units, to 20 in the Ta-ka Flyer assortment or 21 rather, is that right?

A. Different kinds of candy altogether.

Q. And the 25 bar assortment of last summer had twenty-five prizes, plus the large box of candy, making a total of twenty-six?

A. Distinctly different kinds of candy.

Q. What is the highest number of prizes packed in these assortments?

47 A. I don't remember.

Q. Does it get much higher than twenty-five?

A. I really don't know. I have never heard of one over twenty-five.

Q. You have never heard of one over twenty-five?

A. No. Pardon me, I will say that I have heard of them manufactured by other companies.

Q. Your company has made none with more than twenty-five prizes?

A. No.

Q. In this Ta-ka Flyer assortment the purchases that procure chocolate creams with an orange center, thereby entitling them to prize packages, procure what value for their money?

A. I don't know. It differs. It is always over one cent.

Q. What is the value of the quarter pound box of candy,—I mean, the half pound box of candy?

A. The retail value, I would say, is 25-cents or over.

Q. Will you tell us, as nearly as you can, the approximate retail value of the remaining twenty prizes contained in this assortment, and describe them.

A. I can't do that, because they are packed especially for this. There are items in here that are packed as straight merchandise in twenty pound cases, sixty pound penny goods, 50-cent a pound chocolates and so forth.

48 Q. The package which contains the 50-cent a pound chocolates contains four chocolates, what would be the retail value of those chocolates?

A. I couldn't tell you.

Q. In terms of pennies, about how many pennies is the package of chocolate creams worth?

A. I have never seen them sold in penny goods.

Q. You haven't?

A. No.

Q. Do you know how much or how many chocolate creams are contained to a pound box?

A. I don't know.

Q. What would you say is the top value of any of the twenty prizes contained therein?

A. I would rather leave that for a retailer to answer. I know that the retail value of that (indicating) is three cents. I happen to know this one.

Q. Pointing to a package containing three chocolate bars stamped in designs of railroad equipment, called speed kings in the trade?

A. Yes.

Q. You know that prize, being one of the twenty, has a retail value of 3-cents?

A. Yes.

Q. That is one of the prizes which the purchaser of
49 a one cent cream carrying an orange center would receive for his money?

A. Yes.

Q. Would you say that is worth 3-cents, referring to a package containing four chocolate coated creams?

A. Absolutely, yes.

Q. Would you say it is worth any more than 3-cents?

A. It is worth 3-cents.

Q. That is one of the twenty prizes contained in the assortment?

A. Yes.

Q. I show you a box called "Bunte Assorted Tartines".

A. That is right.

Q. What is the value of that item?

A. Usually retails in independent stores for 5-cents.

Q. And that is one of the prizes, one of the twenty prizes contained in this assortment?

A. Yes.

Q. Now, the 160 vanilla creams packed in the smaller box are to be sold by the retailer to consumers at one cent each, are they not?

A. Yes.

Q. What would you say is the value of those creams?

A. One cent each.

Q. They are worth one cent each?

50 A. Yes, sir.

Q. At any time has your company made the individual units, whether it be creams or caramels, of a value of less than one cent?

A. Not of that size.

Q. But have you at any time in the breaks-and-takes?
A. Not of that size.
Q. Well, in any size?
A. Not a break-and-take for less than one cent?
Q. Yes.
A. No.
Q. All of the break-and-takes you have manufactured, the individual ones and units purchased by the ultimate consumer, has been of the value of one cent?
A. Yes.
Q. And what would you say the variation on the prizes has been?
A. They are packed especially for the assortment.
Q. But you have some figure?
A. There is no set figure. I mean by that it all depends, that is, one pound of candy can cost $1.00 and one pound of candy can cost 10-cents. It all depends on what kind of candy it is.
Q. But the number of prizes varied from sixteen to twenty-five in the box, so far as your company is concerned?
51 A. Yes.
Q. Has the value of the prize, the plurality of the prizes, sixteen or twenty or twenty-five, varied from three to 5-cents in value per piece?
A. It all depends on what kind of candy is used.
Examiner Furnas: I think the witness has testified that they are worth 3-cents and the other box retails at 5-cents, haven't you? Am I right on that?
The Witness: Yes.
Mr. Kolinski: Off the record.
(There was a discussion off the record.)
Mr. Kolinski: Will you read my last question?
(The question and answer referred to were read by the reporter.)
The Witness: The value of the prizes depends on the assortment that is made up and how it is made up. It all sells wholesale for 85-cents per assortment.
By Mr. Kolinski:
Q. And when the prizes are less than twenty or twenty-five, namely, sixteen, the individual sixteen units are apt to be worth 5 cents each, are they not?
A. Or over, depending on the type of candy used.
Q. What is the approximate size of the large box used as a container for the Ta-ka Flyer assortment which you have identified? Is it approximately 14 by 10 by 2½ inches?

52 A. Well, I say approximately 14 by 10 by 3.

Q. And the half pound box of chocolates is a standard 8 by 4 inch?

A. It is a standard half pound one layer package.

Q. Or container?

A. Or container.

Q. And the small box which contains the 160 creams is approximately what size?

A. About 7 by 5 by 3.

Q. 7 by 5 by 3. And the two smaller boxes are contained in the lar[illegible]ox along with the twenty-five prizes or package prizes?

A. Yes.

Q. Making one complete unit, and contained therein is the circular entitled "Ta-ka Flyer Assortment" which we read into the record?

A. Yes.

Q. And on the front of the cover of the large container appears this legend:

"160 net count. 1 for 1¢. 160 net count.
"Ta-ka Flyer Bar Assortment.
Bunte Brothers, Chicago, U. S. A."

A. Yes.

Mr. Kolinski: Mr. Examiner, I offer in evidence then as Commission's Exhibit 2-A being the front portion
53 of the cover on the large box, and as Commission's Exhibit 2-B the circular enclosed therein, both being a part of the Ta-ka Flyer Assortment.

Examiner Furnas: Is there any objection?

Mr. Krein: No objection.

Examiner Furnas: Let them be received and be marked as Commission's Exhibits 2-A and 2-B.

(The documents referred to were marked "COMMISSION'S EXHIBITS 2-A and 2-B," and received in evidence.)

Mr. Kolinski: That is all I wish to ask the witness at this time.

(Witness excused.)

Mr. Kolinski: At this time I am asking for an adjournment in this proceeding to 10:00 a. m. on Tuesday, May 4, 1937 in this room. I may state that I have conferred with counsel and that counsel will be busy next week in other court matters, and that will be an agreeable date to me.

Examiner Furnas: To reconvene in this place here?

Mr. Kolinski: Yes. The witness will have additional

information then and there will be other witnesses subpoenaed of course.

Examiner Furnas: Then this hearing will be adjourned as to date and place as set forth by counsel for the Commission in the motion made. The hearing is now adjourned.

(Whereupon, at 12:25 o'clock p. m., April 16, 1937,
54 the hearing in the above entitled matter was adjourned to May 4, 1937 at 10:00 o'clock a. m. in room 1123 New Postoffice Building, Chicago, Illinois.)

57 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—2695) * *

Room 1118, New Post Office Building.
433 West Van Buren Street,
Chicago, Illinois,
May 4, 1937.

Met, pursuant to adjournment, 9:40 a. m. CST.

Before:

Miles J. Furnas, Examiner.

Appearances:

P. S. Kolinski, attorney for the Federal Trade Commission.

Samuel G. Clawson, by LeRoy Krein, appearing for respondent. (105 West Adams Street, Chicago, Illinois.)

58 PROCEEDINGS.

Examiner Furnas: Gentlemen, are you ready to proceed?

Mr. Kolinsky: Yes, your Honor.

Examiner Furnas: Let the record show this is a reconvening by agreement and notice of hearing in Docket No. 2695, 9:40 a. m. in room 1118 New Post Office Building, Chicago, Illinois, Federal Trade Commission *vs.* Bunte Brothers, Incorporated. The last hearing was held at Chicago on the 16th of April, 1937. The record will show that counsel for the Commission and also counsel for the respondent are present.

Now, we will proceed with the hearing. Who is your first witness?

Mr. Kolinski: I have some further questions of Mr. Bunte, who has already been sworn.

FERDINAND A. BUNTE resumed the stand and testified further as follows:

Further Direct Examination by Mr. Kolinski.

Q. Mr. Bunte, did I ask you the capitalization of your company?

A. Yes.

Q. What was that?

A. It is capitalized at $1,000,000.

59 Q. Have you the figures on the number of candy jobbers to whom you sell your products in the state of Illinois?

A. I have.

Q. How many?

A. Seven hundred and ninety.

Q. That you sell to?

A. Yes.

Q. Do you sell your break-and-take assortment known as Ta-Ka Flyer to these jobbers?

A. I could not say we sell that assortment to all of them.

Q. To about what proportion of them do you sell it?

A. I don't know.

Q. Do you know how many units of the Ta-Ka Flyer assortment you sold in the state of Illinois?

A. What year?

Q. Give us all the years you have. Give us the year 1935, 1936 and 1937 to date.

A. I can't give you those. I have 1935, approximately 40,000 units.

Q. And 1936?

A. 86,000 units approximately.

Q. And 1937 to date?

A. I haven't those figures.

Q. Is there anybody at your plant acquainted with the facts who could tell us what proportion of the job-

60 bers you sell to are sold the Ta-Ka Flyer assortment?

A. No, there is not. That is, I will say that, I believe it could be done but it would be very expensive accounting.

Q. Is the distribution of the Ta-Ka Flyer assortment general throughout the state of Illinois?

A. I believe it is.

Q. At what price is it sold?

A. Eighty-five cents. I would like to go back to your

first question about distribution. I would like to retract that answer and say it is not equally distributed throughout the state of Illinois, that the large proportion is within the city limits of Chicago.

Q. When you say a large proportion of the 86,000 units were sold in Illinois, about what proportion were sold in the city of Chicago?

A. I would say a very large proportion.

Examiner Furnas: Forty-five per cent?

A. Yes.

By Mr. Kolinski:

Q. The 790 candy jobbers to whom you sell comprise approximately what proportion of the total candy jobbers in the state of Illinois?

A. I haven't any idea.

Q. Do you have any idea how many candy jobbers there are in the state of Illinois?

61 A. No, I haven't.

Q. Do you have any figure at all that occurs to your mind?

A. I don't think that figure can be obtained because there are so many people vending candy known as jobbers or wholesalers. I don't believe anyone knows who they all are.

Q. Can you approach an approximation?

A. No, I can't.

Q. It is your business policy though to cover all candy jobbing distribution outlets in the state of Illinois, is it not?

A. Providing they can meet our credit terms.

Q. Do you know what the total volume of penny goods is that you sold in the state of Illinois?

A. Yes.

Q. What is that?

A. I had those figures, Mr. Kolinski, and I left them at the office.

Examiner Furnas: Can you give an approximate answer?

The Witness: No, I can't. Have you those figures, Mr. Krein?

Examiner Furnas: This off the record.

(There was a discussion off the record.)

Examiner Furnas: On the record.

The Witness: Approximately $275,400 in 1935;

62 $314,400 in 1936.

By Mr. Kolinski:

Q. Is that inclusive or exclusive of break-and-takes?

Mr. Krein: This is inclusive. The question was all and that is what we have given you.

Mr. Kolinski: Yes.

By Mr. Kolinski:

Q. Have you been able to reach any figure as to the number of retailers in the state who handle your product?

A. No; it is impossible to obtain those figures.

Q. Your best judgment is that it is at least 50 per cent and maybe as high as 90 per cent of the retailers in the state of Illinois?

A. I haven't any idea. Those are figures that cannot be obtained by us as we have no direct contact with them.

Q. The 790 jobbers to whom you sell have good distribution in this state?

A. I presume they must have to stay in business.

Q. You sell to them for that very reason, isn't that the case?

A. We sell them candy. What they do with it, we don't care.

Q. You sell them because they in turn sell it?

A. We sell them candy. We have no jurisdiction over their outlets at all.

63 Q. How many salesmen do you have traveling within the state of Illinois?

A. Fifteen.

Q. On duty full time?

A. Yes.

Q. Breaking down the cost on the assortment represented by Exhibit 2-B, the Ta-Ka Flyer assortment, there are 160 creams, twenty bar prizes and a half pound box of candy; what are the relative costs of these three items?

A. I haven't those figures.

Q. Are you in position to give us that?

A. No, I am not. We sell it as a unit.

Q. Do you know the weight of the small container which contains 160 chocolate creams?

A. I don't know.

Mr. Kolinski: May we have a short recess now, your Honor?

Examiner Furnas: Yes.

(A short recess was taken.)

Examiner Furnas: Let the record show the recess is over and we will proceed.

By Mr. Kolinski:

Q. The number of candy jobbers to whom you sell being 790, has that number been stationary approximately during the years 1935 and 1936?

64 A. I don't believe so.

Q. How much change has there been?

A. I don't know, but according to our credit man's complaint, I believe there has been quite a turn-over in jobbers throughout the country, so I could not say as to Illinois.

Q. Have you during the years 1935 and 1936 had less than 500 candy jobbers?

A. In Illinois?

Q. Yes.

A. No.

Q. It has always been a figure in excess of 500?

A. Yes.

Mr. Kolinski: That will be all from this witness.

Mr. Krein: I have a couple of questions I would like to ask.

Examiner Furnas: You may proceed with the cross-examination.

Cross-Examination by Mr. Krein.

Q. Mr. Bunte, referring to the assorted bars so designated by the label in the Ta-Ka Flyer assortment or packages, as you designate them, those are packed especially for these assortments?

A. Yes.

65 Q. The candy contained therein, is that from your regular stock?

A. The ingredients are from our regular stock and the quality and workmanship is of our standard.

Q. You sell the same candy that is in the assorted packages in large quantities to retailers?

A. In some cases.

Q. And the value of those packages is as you have stated between three and five cents retail value?

A. Yes.

Q. All the candy in the Ta-Ka Flyer assortment and in any other break-and-take assortment that your company sells is of the same high quality candy that you sell?

A. It is, and for the record, I will put in that it is subject to any confectioner's chemist to disprove that it is not of the highest quality.

Mr. Krein: That is all I have at this time.

Redirect Examination by Mr. Kolinski.

Q. The twenty-bar prizes are not regular five-cent bar stock?

A. They are not.

Mr. Kolinski: That is all.

Examiner Furnas: Have you anything further?

Mr. Krein: No, I haven't.

66 Examiner Furnas: All right. We will recess until the other witnesses come.

(A short recess was taken.)

Mr. Kolinski: We are ready to resume.

Mr. Krein: I would like to ask Mr. Bunte one more question.

Recross Examination by Mr. Krein.

Q. Referring to Commission's Exhibit 2-B, which is the legend that accompanies the Ta-Ka Flyer assortment, one of the items is twenty assorted bars. Those are the assorted bars you have testified contain candy that is of retail value between three cents and five cents. You make no representation in your legend or in the sale of the Ta-Ka Flyer assortment that the assorted bars retail at five cents?

A. No.

Q. Referring to Commission's Exhibit 1, Summer Bar Assortment, one of the items is sixteen five-cent assorted bars, do all of those bars retail at five cents?

A. At the time we turned that assortment out if it stated at five cents, they were five cent bars.

Mr. Krein: That is all.

Mr. Kolinski: No further questions of this witness, your Honor.

Examiner Furnas: You are excused.

67 (Witness excused.)

Examiner Furnas: Are you ready to proceed?

Mr. Kolinski: Yes. I will call as a witness Mr. Harry Lynn.

HARRY LYNN was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Kolinski.

Q. Your name is Harry Lynn?
A. Yes.
Q. Where do you reside?
A. 4932 Lake Park Avenue, Chicago.
Q. Do you appear here under subpoena?
A. Yes.
Q. What is your business?
A. I am a candy salesman.
Q. How long have you been in that business?
A. Thirty years.
Q. And what company do you represent?
A. Four or five companies, the main one being the New England Confectionery Company at Cambridge, Massachusetts.
Q. You may name the others that you represent.
A. Lovell and Covel Company, Cambridge, Massachusetts; Fox-Cross Candy Company, Cambridge, Massa-
68 chusetts; Close & Company, Chicago.
Q. And what branch of the trade do you call on?
A. Jobbers, wholesalers only.
Q. And where are these jobbers and wholesalers located?
A. Illinois, Indiana, Wisconsin.
Q. Do these companies that you represent carry what is known as the line of penny goods?
A. They do with one exception. Fox-Cross has no penny goods.
Q. The other two companies have a line of penny goods?
A. Lovell and Covel have practically no penny goods.
Q. But the New England Company does?
A. Yes, that is the main one.
Q. You call on jobbers and wholesalers generally throughout the state of Illinois?
A. Through most of the state.
Q. Detail briefly your experience during the past thirty years in the candy industry. Have you always been with the New England Company?
A. No, it has been a variety of companies.
Q. From the beginning, if you will, name some of the

companies that you have represented just to show your experience in the industry.

A. The Cracker-Jack Company.

Q. How long were you with them?

69 A. Eight years.

Q. Name some others with the time.

A. The Williamson Candy Company, Curtiss Candy Company, Henry Whitte Company.

Examiner Furnas: They are all located here in Chicago?

The Witness: Yes. Some are out of business. Clark-Doll Candy Company, Milwaukee. Those are the main ones.

By Mr. Kolinski:

Q. During the thirty years that you have called on the jobbing and the wholesale trade in this area, you have had occasion also to see retail candy stores in operation in this area?

A. In operation, but not to call on them.

Q. But as part of your business you have developed an acquaintance with retail candy stores as well?

A. Some.

Q. During the years 1935 and 1936, as well as 1937, up to the present time, you represented the New England Confectionery Company?

A. Yes.

Q. Are you in position to state about how much in value of the Massachusetts companies' product you sell in this state?

70 A. Around $30,000 worth a year, thirty to thirty-five. Close to $3,000 a month comes into Illinois.

Q. Are you familiar with a type of penny assortment sold in the candy industry known as break-and-take assortment?

A. I am.

Q. I show you Commission's Exhibit 2-B, being the legend which accompanies the assortment known as Ta-Ka Flyer Bar Assortment, an exhibit in this case.

(Handing document to witness.)

A. Yes, I have seen that around the territory.

Q. Are you familiar with the operation of the assortments so far as the consumer is concerned in that the purchaser who procures a chocolate cream which carries an orange center procures as a prize one of twenty assorted bars?

A. I am familiar with it, yes.

Q. Have you a personal opinion on such break-and-take mode of selling candy?

Mr. Krein: I object. I don't think it is material.

Examiner Furnas: Well I will let him answer. Objection overruled and exception granted.

Mr. Krein: I also object, I think the question is too broad.

Examiner Furnas: It is broad, very broad.

Mr. Krein: I don't think the witness could possibly know what Mr. Kolinski means.

71 Examiner Furnas: I will let him answer it. I will give you an exception.

The Witness: Will you please read the question?

Examiner Furnas: Read the question to the witness, please.

(The question referred to was read by the reporter.)

By Mr. Kolinski:

Q. By "such" I refer to a method similar to that evidenced by Exhibit 2-B.

A. That has an effect on the trade as a whole.

Q. Have you a personal opinion on that?

A. It takes that much away from the legitimate, what I figure as legitimate candy.

Q. Are you opposed to selling penny candies by the break-and-take method?

A. I am very much so.

Q. What are your reasons?

A. Well, it isn't an honest method of merchandising, in the first place. It interferes with the manufacturer who is doing a clean legitimate business of selling honest merchandise.

Q. In the years of experience that you have had in the candy industry, have you formed an opinion as to the effect of the sales of the break-and-take assortments upon straight sales of candy?

72 A. It takes just that much away from the honest merchandise.

Mr. Kolinski: I have no further questions.

Examiner Furnas: You may cross-examine.

Cross-Examination by Mr. Krein.

Q. Is Lovell and Covel owned by the New England Confectionery Company?

A. It is.

Q. Assuming that the Commission issues an order forbidding Bunte Brothers from shipping in Illinois alone the

break-and-take assortments, it is true, is it not, the possible markets for those sales will be manufacturers both in Illinois and outside of Illinois?

A. No doubt.

Q. Do you know what percentage would be to the benefit of interstate manufacturers and to intrastate manufacturers?

A. No, I could not give a definite estimate.

Q. It is possible, though, every manufacturer in Illinois might secure some benefit from that?

A. I presume so.

Q. It is also possible, is it not, for a manufacturer such as Bunte Brothers, the respondent in this case, to put out a new and different type of product that might get some of the benefit—

73 A. Surely.

Q. (Continuing) —from the loss of that business?

A. Yes.

Q. Do you know what the percentage of the penny break-and-take business is to the penny goods line as a whole in Illinois?

A. I haven't the figures nor an estimate.

Q. Do you know how many manufacturers in Illinois manufacture break-and-take candy?

A. No, I could not tell you.

Q. Would you say there was a substantial number of them?

A. Yes, there is quite a few of them.

Q. Do you know how many manufacturers ship break-and-take candy in Illinois?

A. Into the state from outside?

Q. That is right.

A. No, I could not give you a clear idea.

Q. There is a substantial number of them, would you say?

A. Quite a few.

Q. From your experience in the candy industry, would you say it is impossible for a candy manufacturer to come out with a new and different type of product and still not be able to compete in Illinois by reason of the break-and-take sales?

A. Well, I could come out with a new and different
74 type of candy and I would do business regardless of the break-and-take.

Mr. Krein: That is all I have.

Redirect Examination by Mr. Kolinski.

Q. If the respondent were to cease manufacturing and selling break-and-take assortments in the state of Illinois would the same consumers' purchasing power that went to break-and-takes go to the line of straight goods coming outside of the state?

A. It is quite likely.

Examiner Furnas: Any further questions?

Recross Examination by Mr. Krein.

Q. Could you state whether your company would be able to sell a larger volume in Illinois if the respondent, Bunte Brothers, ceased to manufacture and sell break-and-takes in Illinois?

A. Well, somebody would get the business that takes the place of it and Bunte Brothers would probably get most of it. Possibly the firms I represent might get a sprinkling. It would not make so much difference.

Q. You don't even know positively, do you, whether they would get a sprinkling of it?

A. Somebody would get that business. Probably 75 Bunte Brothers would get most of it.

Mr. Krein: That is all.

Mr. Kolinski: That is all.

Examiner Furnas: You may be excused.

(Witness excused.)

Examiner Furnas: Are you ready to proceed?

Mr. Kolinski: I will call Mr. Fred Waterous.

FRED J. WATEROUS was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Kolinski.

Q. What is your full name?
A. Fred J. Waterous.
Q. Where do you reside?
A. 6141 Washtenaw.
Q. What city?
A. Chicago.
Q. What business are you in?
A. Candy business.

Q. How long have you been in that business?
A. Twelve years.
Q. Will you briefly detail your experience in that industry?
A. I was with the Prendergast Company for three
76 years; the Hollywood Candy Company for four years; the American Chicle Company for two years, and Henry Heide of New York for approximately the past three years.
Q. During the years 1935, 1936 and 1937 to date, you have been a representative of the Henry Heide Company of New York?
A. That is right.
Q. What line of candies does that company sell?
A. They sell a general line, penny goods, nickel goods and bulk goods.
Q. What territory do you cover for them?
A. I cover northern Illinois, including Chicago, Wisconsin and upper Michigan.
Q. Are you in position to state approximately what amount in dollar volume of their product you sell in the state of Illinois?
Mr. Krein: I object to that, your Honor. It isn't limited to penny goods.
Examiner Furnas: Oh, he can answer that. The objection is overruled and exception granted.
The Witness: In the state of Illinois, oh, approximately $100,000.
By Mr. Kolinski:
Q. A year?
A. A year.
77 Q. And that consists of candy for which you take orders in this state and send in your orders to the home office and it is shipped from the place that it is manufactured in the state of New York to the state of Illinois, is that right?
A. That is right.
Q. The Henry Heide Company has its general office and factory in the state of New York?
A. Yes.
Q. What class of trade do you call on?
A. The jobbers principally; a few large retail accounts.
Q. In your work for these various candy companies you have become acquainted with the operation of the retail candy stores in the state of Illinois?
A. To some extent.
Q. I will show you Commission's Exhibit 2-B, being a

legend which accompanies a type of candy known as the break-and-take assortment, and I will ask you to examine that.

(Handing document to witness.)

A. Yes.

Q. This is known as the Ta-Ka Flyer Assortment. Are you familiar with such types of break-and-take assortments?

A. Yes.

Q. You have seen these assortments in the state of Illinois?

78 A. Yes.

Q. Do you carry a break-and-take assortment?

A. No, sir.

Q. Are you opposed to carrying a break-and-take assortment?

Mr. Krein: I object to that. I don't think it is material.

Examiner Furnas: I will let him answer.

Mr. Krein: Exception.

Examiner Furnas: Exception granted.

The Witness: Beg pardon?

Examiner Furnas: Read the question to the witness.

(The question referred to was read by the reporter.)

The Witness: Yes.

By Mr. Kolinski:

Q. Have you any reasons for that?

A. It is contrary to the policy of my company.

Q. Have you any other reasons? Have you any personal reasons?

Mr. Krein: I object, your Honor. I don't think it is material.

Examiner Furnas: Let him answer. Objection overruled and exception granted.

The Witness: Why, no, I have no personal objec-

79 tion.

By Mr. Kolinski:

Q. From your experience in the candy business have you been able to form an opinion as to the effect of the volume of sales of break-and-take assortments upon the volume of straight goods generally?

A. Oh, they undoubtedly affect the sale of straight goods to a large extent.

Q. How do they affect it?

A. Well, they reduce the volume on regular merchandise.

Mr. Kolinski: That is all.

Examiner Furnas: Cross examine.

Cross-Examination by Mr. Krein.

Q. How many jobbers do you sell to in Illinois, Mr. Waterous?

A. Oh, approximately ninety accounts, one hundred accounts probably.

Q. Breaking down this volume of business done in Illinois, which you state to be $100,000 a year, that consists of sales of bulk candy, penny candy and five cent candy, is that right?

A. That is right.

Q. About what percentage of that consists of sales of penny candy in Illinois?

80 A. The bulk of my business is on penny goods. I would say probably better than 80 per cent of that is penny goods.

Q. Do you know how many manufacturers in Illinois manufacture break-and-take candy?

A. I don't exactly know.

Q. Would you say there is a substantial number?

A. I would say there was a fair percentage of them.

Q. A percentage of manufacturers. Would you say that percentage was a substantial number of manufacturers?

A. Who are making that at the present time?

Q. Yes.

A. Or who have made them?

Q. Who are making them?

A. That I could not say.

Q. Do you know how many manufacturers ship break-and-take candy into Illinois?

A. No.

Q. There is a substantial number of them?

A. I could not answer that.

Q. Assuming that the Federal Trade Commission issues a cease and desist order forbidding the respondent, Bunte Brothers, from manufacturing and selling in Illinois break-and-take candy, it is possible, is it not, for the respondent to retain some of that lost volume by his regular sales of candy?

A. I would say so.

81 Q. It is possible, is it not, for every manufacturer in Illinois to procure some benefit by that decreased volume of Bunte's in break-and-take?

A. Possibly.

Q. What type of penny goods do you sell?

A. Penny gum bar, penny marshmallow, penny chocolate goods, penny hard goods, penny cocoanut.

Q. Do you know what percentage of any possible benefit might be secured by the interstate manufacturers as contrasted with the intrastate manufacturers if a cease and desist order is issued?

A. I don't understand that.

Q. Well, assuming a cease and desist order is issued prohibting the sale of the break-and-take assortments, it is possible for both intrastate manufacturers and interstate manufacturers to secure some benefit?

A. Through the discontinuance?

Q. Of the break-and-takes.

A. Yes, I would say so.

Q. Do you know what percentage?

A. No.

Q. It is possible, is it not, for the respondent, by putting out a new and different type of candy, good quality and quantity, to retain the volume that he has lost through the penny break-and-takes?

82 A. I would say it would be possible for him to retain a good portion of it.

Q. Do you know if the cease and desist order is issued approximately what benefit could be secured by the companies that you represent?

A. Oh, possibly it would help my business.

Q. That is a mere opinion or guess?

A. Well, there is only so much penny goods sold. If break-and-takes are eliminated, why, it would just mean more of the other types of the penny goods would be sold, and I assume I will benefit.

Q. As I said, it is possible for the Illinois manufacturers or for Bunte himself to absorb that, at least, it is possible, is it not, so that no resulting benefit would be secured by interstate manufacturers?

A. Well, anything is possible, I suppose.

Q. Have you ever heard of B.B. Bats?

A. Yes.

Q. That is a candy product that has arisen since the depression, has it not?

A. No.

Q. It is a new product, is it not?

A. No.

Q. The one-cent Baby Ruths, O Henry, Butter Fingers, Hershey Bars, aren't those all relatively new products?

83 A. That all depends on what you mean by "new". If you mean within the last year or two years, why, no.

Q. I mean since the depression.

A. Well, most of those I think entered the market in the past seven or eight years.

Q. And substantial amounts are being sold at the present time?

A. Yes.

Q. In competition with break-and-takes?

A. Yes, in competition with all penny goods.

Q. Do you know how many manufacturers of penny candy there are in Illinois?

A. No, I don't.

Q. Have you any opinion?

A. Oh, possibly thirty or thirty-five.

Mr. Krein: I don't have any further questions.

Examiner Furnas: Anything further, Mr. Kolinski?

Mr. Kolinski: I just want to confer with counsel.

Examiner Furnas: Are you through with the witness?

Mr. Kolinski: Yes, I am through with the witness.

Mr. Furnas: All right. You may be excused.

(Witness excused.)

Examiner Furnas: Are you ready to proceed?

Mr. Kolinski: Yes I will call Mr. Leon Leien-

84 decker as a witness.

LEO LEIENDECKER, was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Kolinski.

Q. What is your name?

A. Leo Leiendecker.

Q. Where do you reside?

A. 8117 Kenwood Avenue.

Q. City of Chicago?

A. City of Chicago.

Q. What business are you in?

A. Salesman for Frank H. Fleer Company, Philadelphia, chewing gum.

Q. They are located in Philadelphia?

A. Yes.

Q. What territory do you cover for them?

A. Metropolitan Chicago and part of Wisconsin.

Q. Do you know approximately what dollar volume of their goods you sell in the state of Illinois only?

A. No. That would be, it is close to $50,000. I was looking over the checking last night.

Q. That covers goods for which you take orders in the state of Illinois, transmit the orders to the manufac-
85 turer's plant in Philadelphia, and the goods are shipped from Philadelphia to Illinois?

A. We have a warehouse in Chicago. Our orders are shipped in. We get them by the carload lots from Philadelphia.

Q. The gums that you sell are originally manufactured in Philadelphia, Pennsylvania?

A. Yes, Philadelphia.

Q. How long have you been in the candy business?

A. About ten years; ten years the 10th of December.

Q. Just briefly detail that experience.

A. Well, I started out as detail man working in this territory, working under Mr. Kraus who was our representative. A little while ago, about a year ago, he died, and I took his position and I have been working in the territory since then myself.

Q. What class of trade do you call on?

A. Jobbers.

Q. In your ten years experience in that business you have had occasion to become acquainted with the method of operating retail candy stores also?

A. Yes. In fact, I was in the retail business myself for twelve years.

Q. Before?

A. Before I started on this job.

Q. Where was that?

86 A. 82nd and Stony Island Avenue, 84th and Stony Island Avenue, and 75th Street in Chicago.

Q. I show you Commission's Exhibit 2-B, being the legend that accompanied the break-and-take assortment mentioned in this proceeding.

(Handing document to witness.)

Q. Are you familiar with such type of assortment?

A. Oh, yes, I see them around all the jobbers I go to.

Q. Are you familiar with the operation whereby the purchaser who procures a cream with an orange center is thereby entitled to procure one of the twenty large bars?

A. Yes. The last one I think is for a large box of chocolates.

Q. You have seen that break-and-take assortment, the Ta-Ka Flyer assortment in the state of Illinois?

A. Yes.
Q. You have seen it frequently?
A. Well, pretty nearly every jobber. It is more in the form of this box that we see. It isn't a large banner like this. It is more like this cover here, Ta-Ka Flyer, that you see it.
Q. You have seen the large container, known as Commission's Exhibit 2-A the box itself?
A. The box itself.
Q. That contains the small box of creams?
87 A. And the small assorted bars and also the small prize bars.
Q. Do you carry a break-and-take assortment?
A. No, we don't.
Q. Are you opposed to the break-and-take assortments?
A. I certainly am.
Q. What are your reasons?
Mr. Krein: I object to that. I don't think it is material.
Examiner Furnas: The objection is overruled and exception granted.
The Witness: Well, in legitimate business, I think it takes away from the legitimate trade.
By Mr. Kolinski:
Q. Have you any other reason?
A. That is all.
Q. From your experience in the candy business, have you formed an opinion as to the effect of the total sales of break-and-takes upon the total volume of straight goods sold?
A. Well, I will tell you, I think there is—that is a hard thing to testify on.
Q. Have you formed an opinion on the effect of the break-and-takes?
A. I think it hurts the regular trade.
Q. How does it hurt it?
88 A. The children come in and they see prizes. Instead of buying the regular goods they will take a chance and pick out a bar.
Q. In your opinion, does that affect the volume of this goods?
A. Yes, it does.
Q. How does it?
A. The kiddies will try for the prize. If they don't win they will take another, and if they don't win they will spend their nickel and try for that. They might win the

big bar sometime. If they don't win the big bar on the first penny they will try with some more.

Q. How does that affect the volume of straight goods?

A. A kid will take a chance. If he wins the bar he goes and buys four cents of other candy. If he takes a chance and he does not win he will keep on until he wins the big bar. He is looking for that big bar of candy.

Q. Does that have any effect upon the other lines of penny goods which do not have the break-and-take assortment?

A. Naturally, it keeps the kids from buying the regular merchandise when they have a chance like that.

Q. From your experience in the candy business, has your failure to carry a break-and-take assortment affected the amount of straight business you have been able to do?

A. I have never carried one in my store. I never
89 had a punchboard in my store.

Q. In selling to the jobbers in the state of Illinois, has your failure to carry a break-and-take assortment affected the volume of straight business you are able to sell?

A. I could not see it would. At the present time with all of these other break-and-takes on the market it has not hurt my business at all. I am going right along and doing a good business without a break-and-take.

Mr. Kolinski: That is all.

Examiner Furnas: Cross-examine.

Cross-Examination by Mr. Krein.

Q. Do you sell candy for the Fleer Company?

A. No, sir, just chewing gum.

Q. Are you acquainted with the fact the Department of Commerce has not classified chewing gum as a confectionery?

A. As a confectionery?

Q. It is not classified. Are you acquainted with that?

A. No, I don't know.

Mr. Krein: I have no further questions.

Examiner Furnas: Anything further.

Redirect Examination by Mr. Kolinski.

Q. Your product is sold in the candy industry generally?

A. Generally.

90 Q. It is sold wherever confections are sold?

A. Yes. That is the best way I can know that.
Q. It doesn't happen to be correct. You know that gum is not classified as a food product?
A. Yes.
Q. And candy is classified as a food product?
A. Yes.
Q. Do you know what is the correct classification that is made by the Department of Commerce?
A. I don't know.
Mr. Kolinski: That is all.
Mr. Krein: That is all.
(Witness excused.)
Examiner Furnas: Are you ready to proceed?
Mr. Kolinski: Yes. I will call Mr. Axel W. Carlson as the next witness.

AXEL W. CARLSON was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Kolinski.

Q. What is your name?
A. Axel W. Carlson.
Q. Where do you reside?
A. 2912 North Long Avenue.
91 Q. Chicago, Illinois?
A. Yes.
Q. What business are you in?
A. Brokerage, candy.
Q. You are a candy salesman?
A. Yes.
Q. How long have you been in that business?
A. About twelve years.
Q. By whom are you employed?
A. The Shotwell Manufacturing Company. I represent them.
Q. Are they a Chicago concern?
A. Yes.
Q. What territory do you cover?
A. Metropolitan Chicago.
Q. I show you Commission's Exhibit 2-B, being the legend which accompanies the break-and-take assortment known as the Ta-Ka Flyer.
(Handing document to the witness.)

Q. Have you ever seen that assortment on display in the city of Chicago?

A. Yes.

Q. Just how frequently have you seen them?

A. Well, sir, it is quite popular, practically wherever candy is sold, wherever candy is handled.

Q. In candy stores wherever candy is sold you have
92 seen that assortment on display?

A. Where I have called on the jobbing trade business.

Q. In your experience in the candy industry, have you an opinion as to the effect the sale of candy in such break-and-take assortments has upon the sale of straight candies which are not sold by break-and-take assortments?

A. Well, when candy is bought the pennies are spent for this type of merchandise and naturally it stops the sale of some other piece of candy.

Mr. Kolinski: I have no further questions.

Examiner Furnas: Cross-examine.

Mr. Krein: I have no questions.

Examiner Furnas: You may be excused.

(Witness excused.)

Examiner Furnas: Are you ready to proceed?

Mr. Kolinski: I will call Mr. E. W. Shahan as the next witness.

E. W. SHAHAN, was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Kolinski.

Q. What is your full name?

A. E. W. Shahan.

Q. Where do you live?

93 A. 1824 Greenleaf Avenue, Chicago.

Q. What business are you in?

A. Candy brokerage business.

Q. What companies do you represent?

A. I represent the Pecheur Lozenge Company, of Brooklyn, New York, 45 York Street, Brooklyn.

Q. And the others?

A. F. M. Paist Company, American and Jefferson Streets, Philadelphia.

Q. State of Pennsylvania?

A. Pennsylvania.

Q. Any others?

A. H. B. Reese Candy Company, Hershey, Pennsylvania.

Q. What lines of candy do these manufacturers make and sell?

A. What lines?

Q. Yes.

A. The Pecheur Company makes nothing but lozenges, nothing but lozenge goods, rather.

Q. Selling in what price field? In what price field do they sell?

A. What price? Generally a penny goods line with the exception of a five cent wafer roll. They also manufacture bulk goods, menthol and wintergreen lozenges and such.

Q. The Paist line is what?

94 A. A caramel line almost exclusively.

Q. Consisting of penny goods?

A. All penny goods.

Q. Are you in position to state approximately the volume of these companies' products which you sell in the state of Illinois annually?

A. No, I am not. I keep a record of all that but I don't happen to have it in mind. I haven't the states separated, incidentally.

Q. Can you give us an approximation of the volume that comes to Illinois?

A. In the state of Illinois?

Q. Yes.

A. Oh, more than $10,000.

Q. A year? That has been true for the years 1935 and 1936?

A. Yes.

Q. In excess of $10,000?

A. Beginning with about 1934.

Q. That covers goods for which you take orders in the state of Illinois and transmit orders to the plant or home office and the goods are shipped from New York or Pennsylvania, as the case may be, to the customers in the state of Illinois?

A. Yes.

Q. What class of trade do you call on?

95 A. The jobbing candy business, the jobbing confectioners, wholesale grocers occasionally, and department stores.

Q. Do you cover all the state of Illinois?

A. Yes.

Q. How long have you been in the candy business?

A. Well, fifty-three years the day before yesterday.

Q. Just detail briefly that experience.
A. Sir?
Q. Give us the high lights in that experience.
A. Well, I don't know whether it will do you any good to do that or not.
Q. What companies have you been with and how long?
A. I was with the National Candy Company, three of their factories.
Q. For how long?
A. I think I was in Detroit one year. Then I was transferred to Chicago for the National factory on Superior Street as a salesman. I went with the Walter factory of St. Louis. I believe I was with them five years.
Q. How long were you with the National?
A. About seven or eight years altogether.
Q. The Walter?
A. That is part of the National Candy Company.
Q. You were with them five years?
A. Five years, I think.
96 Q. In what capacity?
A. Salesman.
Q. What other experience have you had?
A. I was with the P. Eckhart Company a good many years. That is in Cincinnati. They became, or they merged with the National Candy Company when it was formed in 1906, I believe. I was with Martin Dawson of South State Street for twelve years.
Q. As candy salesman?
A. Yes, sir. They are out of business.
Q. You were employed in the capacity of candy salesman?
A. Yes.
Q. What followed that? After that whom were you with?
A. I went from Dawson to the National Candy Company. I was with a brokerage concern in the city here one year in 1911, I think it was. Then I went with the National Candy Company.
Q. How long have you been with the present companies?
A. I should say I was manager of the American Caramel factory here. I opened it over on Green Street.
Q. How long did you hold that position?
A. One year.
Q. How long have you been with Pecheur and with Paist?
A. About ten years I would say. No, I have been with Pecheur about ten years, and I have had the Paist line
97 some six or seven years.

Q. Your fifty-three years experience in the candy business has been as salesman, broker, factory manager, and it has covered some seven or eight companies, is that right?

A. Yes, or more, even. I represented the Quaker City Company, a chocolate and confection company, as broker, and a number of other plants. In the brokerage business, I don't care how long you are handling a line, unless it is a line that is a successful line, a lot of lines it don't pay you to bother with.

Q. You always operated in the state of Illinois?

A. I beg your pardon?

Q. You have always operated in this state?

A. No, no. I covered five states, handling the city of Detroit.

Q. Where are your headquarters?

A. In Chicago.

Q. At all times you have had some connection with the state of Illinois?

A. Yes. Many years ago I did not work in Illinois, but very slightly, before I moved here. In fact, I only worked two or three towns in the state. I covered all the southern states and the east.

Q. How many years continuously now have you worked in the state of Illinois?

98 A. You mean the state of Illinois only?

Q. A part of your work.

A. 1921.

Q. In that work you have become acquainted with retail methods of selling and retail stores?

A. Quite a number of them.

Q. In the candy industry?

A. Yes.

Q. Are you familiar with the type of assortment represented by Commission's Exhibit 2-B in this case, a break-and-take assortment called Ta-Ka Flyer?

A. Yes, I know all about it. This particular package, no, sir, I never seen the inside of that. I have seen the label, however.

Q. You have seen it in its container in which it is boxed?

A. In a box, yes. I have never seen the box inside, I don't think, not that I recall.

Q. Looking at this legend further, the creams with orange centers procure the twenty bar prizes?

A. Yes.

Q. The 140 of the creams which do not have an orange center of course procure only the one of the 140 creams?

A. Yes.

Q. You are familiar with the operation of those break-and-takes?

99 A. Yes.

Q. You know the distinction between that and the straight goods when I use the term "straight goods"?

A. Yes.

Q. Are you personally opposed to carrying the break-and-take assortment?

A. I am.

Mr. Krein: I object.

Examiner Furnas: Objection overruled. Exception granted.

By Mr. Kolinski:

Q. For what reasons?

A. Because I don't think they are a good thing for the industry.

Q. Have you any other reason?

Examiner Furnas: Just a minute.

Mr. Krein: The objection was, it was immaterial, like the others.

By Mr. Kolinski:

Q. Have you any other reason?

A. Well, I don't think they give the kid, the consumer, a square deal.

Q. From your experience in the candy industry, have you an opinion as to the effect the volume the break-and-takes sold has upon the whole volume of straight candy sold?

100 A. You mean the percentage of business?

Q. Just the effect. Have you an opinion on that?

A. Well, yes.

Q. What is that opinion?

A. The new draw that comes out, if it is what is commonly called, if it clicks, it is bound to cut an awful figure in the penny goods business. In other words, the kids will fall for that and buy that and that only for a certain length of time until the attractiveness or the excitement of it passes over.

Q. From your experience in the candy industry, have you found whether the failure to carry a break-and-take assortment has affected your straight business that you have been able to sell?

A. Yes, absolutely.

Q. How?

A. In a great many towns a great many jobbers here and there will say their business is on draws to the detri-

ment, of course, of staple lines as well as new items coming out that are not draws.

Mr. Kolinski: I have no further questions.

Examiner Furnas: You may cross-examine.

Cross-Examination by Mr. Krein.

Q. Mr. Shahan, what sort of candy does the Reese
101 Company manufacture? What types of candy does the Reese Company manufacture?

A. Reese? They manufacture chocolate goods only; only one item they sell to any extent.

Q. What is that item?

A. Chocolate peanut butter cups.

Q. What is the retail value of them?

A. What is the retail value?

Q. Yes.

A. A penny item. It is the only one they make. They have taken flyers at other pieces. When they did not prove to be a winner they dropped them at once.

Q. The candies that you sell for these three companies are sold in retail stores?

A. Always, alw ys.

Q. In retail candy stores?

A. Candy stores or stores where candy is handled, a lot of them. This peanut butter cup I think you will find that in every cafeteria and every cigar stand in Chicago in the loop.

Q. Is this $10,000 a year figure on volume of business that you do in Illinois—

A. That is approximately.

Q. (Continuing.) —an approximate figure in Illinois?

A. An approximate figure in Illinois. Understand
102 I did not give you that as a definite figure. I said that or more.

Q. I see. Assuming that a manufacturer of a penny break-and-take assortment has for the creams that the consumer purchases for one cent each a good quality candy, good quantity, a good one cent value, assuming all those facts, would you say the kids are getting a square deal or are not getting a square deal?

A. I have never seen a draw in my life that gives the kids a cent's worth of candy in the draw, if that is what you are getting at.

Mr. Krein: I move that the answer be stricken.

The Witness: Many of the penny items the kids get should not be allowed to be sold.

Examiner Furnas: That is his opinion. I will let it stay in.

Mr. Krein: I am asking it be stricken because it is not responsive. I am asking the witness a hypothetical question.

Examiner Furnas: I think he answered your question. I will let it stay in the record.

Mr. Krein: I don't think there is an answer there. I will repeat the question.

Q. (By Mr. Krein.) Assume the candy is of one cent value in the draws, do you think the children are getting a square deal?

103 A. I don't see how you can place that kind of an assumption on it, because they can't give, they can't pack honest goods, anywhere from fifteen to thirty capital prizes, and a box of chocolates, one draw, and give the kid true value.

Mr. Krein: I move that be stricken.

Examiner Furnas: No, he has already answered your question on that. I will leave that in.

The Witness: If you will permit me voluntarily—

Mr. Krein: Just a minute, Mr. Shahan.

Examiner Furnas: Just a minute. No.

By Mr. Krein:

Q. Have you ever heard of Pippins?

A. Yes.

Q. B. B. Bats?

A. Yes.

Q. One cent Baby Ruths?

A. Yes, sir.

Q. O-Henry?

A. Yes, sir.

Q. Butter Fingers?

A. Yes.

Q. Hershey bars?

A. Yes, sir.

Q. Those are products that have recently been put on the market, are they not, since the depression?

104 A. I would not say recently, because I think every one you have mentioned have been on the market more than five years.

Q. Since the depression?

A. One of the biggest sellers and the best values is the first one you mentioned.

Q. Manufactured by the respondent in this case?

A. Pippins was the one I think you mentioned first.

Q. Manufactured by Bunte Brothers, the respondent in this case?

A. Yes.

Q. Those products have been competing with the other candy sold in Illinois?

A. I imagine so.

Q. Competing against the break-and-take sales?

A. Yes.

Q. Do you know how many manufacturers in Illinois manufacture break-and-takes?

A. No, sir, I do not.

Q. Would you say it is a substantial number?

Mr. Kolinski: I think I will interpose an objection.

Examiner Furnas: Objection overruled. I will let him answer if he knows.

The Witness: Possibly fifteen or more.

105 By Mr. Krein:

Q. Do you know how many manufacturers ship break-and-takes into Illinois?

Mr. Kolinski: I will interpose an objection to that. That is irrelevant to this proceeding.

Examiner Furnas: Objection overruled. I will let him answer. Read the question.

(The question referred to was read by the reporter.)

The Witness: From outside states?

By Mr. Krein:

Q. Yes.

A. No, sir, I do not.

Q. Would you say it is a substantial number?

A. Twenty-five or more. That is only a guess—

Q. Yes.

A. (Continuing.) —based on different packages I happen to have seen here and there.

Q. Assume, Mr. Shahan, that the Commission issues a cease and desist order prohibiting Bunte from manufacturing and selling break-and-take assortments in Illinois, it is possible, is it not, for Bunte Brothers to still retain the volume by their own products, their other penny products, or by putting out a new and different product?

A. I am going to ask you to repeat that.

Examiner Furnas: Read the question.

106 (The question referred to was read by the reporter.)

Examiner Furnas: Off the record.

(There was a discussion off the record.)

Examiner Furnas: On the record.

The Witness: If they are stopped putting out draws and they continue to keep up the same volume of business?

By Mr. Krein:

Q. Yes.

A. That is it. If the same amount of effort is put forth on other items, other good items, I don't see why there is any reason why anybody should not keep up their volume of business.

Q. In that event no manufacturers in Illinois or outside of Illinois could benefit in the event the break-and-takes cease?

A. I didn't get that.

Examiner Furnas: Off the record.

(There was a discussion off the record.)

Examiner Furnas: On the record.

The Witness: I don't think so. The benefits that would be derived from such an action would not be great, at least.

By Mr. Krein:

Q. In the event the same volume is retained by Bunte there would not be any benefit to interstate or intra-
107 state manufacturers?

A. I don't think so.

Q. From your experience in the candy industry, Mr. Shahan, and from your knowledge of the respondent's products and their merchandising policies, do you say it is probable that would take place in the event Bunte Brothers were forbidden to manufacture and sell break-and-takes, that they would be able to retain their volume?

A. I would say so, yes.

Mr. Krein: That is all.

The Witness: I think the same efforts that are put forth on the selling of draws would be put forth on new items.

Examiner Furnas: Any further questions?

Mr. Kolinski: Yes.

Redirect Examination by Mr. Kolinski.

Q. Assuming that Bunte should stop putting out the Ta-Ka Flyer assortment at a rate of, say, 86,000 units being sold in 1936, that is, 86,000 were sold in 1936, would it be just as possible for other manufacturers in Illinois and other manufacturers outside the state of Illinois to get some of that business?

A. I don't think so.

Q. Why not?

108 A. Well, just on account of what a jobber said a few days ago, or two weeks ago, he would not buy a box of draws excepting from Bunte Brothers, if there was

any chocolate in it, and one of the best jobbers in the state of Illinois said that. I had a draw to show him. That is what brought that remark out.

Q. If Bunte stopped making this draw or stopped selling the draw, wouldn't that affect the volume of straight business that would be available for other manufacturers?

A. Would it affect what?

Q. The volume of straight business that would be available?

A. Temporarily, possibly.

Q. Your view is Bunte would put forth additional effort and recoup that business?

A. Absolutely.

Q. If he stopped selling 86,000 draws or assortments like the Ta-Ka Flyer, that would make just that much more market for penny candy available for your manufacturers?

A. Absolutely.

Q. Within Illinois as well as without Illinois, is that right?

A. Yes.

Mr. Kolinsky: That is all.

Examiner Furnas: You may be excused.

(Witness excused.)

109 Mr. Kolinski: I will ask for a short adjournment until one o'clock Central Standard Time.

Examiner Furnas: Let the record show we have adjourned to reconvene at one o'clock Central Standard Time.

(Whereupon, at 11:40 a. m., CST, a recess was taken until 1:00 p. m., CST.)

Afternoon Session.

1:00 p. m., CST.

Examiner Furnas: Let the record show this hearing reconvened at one o'clock Central Standard Time. Have you a witness?

Mr. Kolinski: Yes.

FREDERICK NICHOLAS CONYBEAR was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Kolinski.

Q. What is your full name?
A. Frederick Nicholas Conybear.
Q. Where do you reside?
A. 3851 North Kildare Avenue.
Q. What city?
A. Chicago.
110 Q. What business are you in?
A. I am salesman for the D. L. Clark Candy Company, confectioners.
Q. Where are they located?
A. Pittsburgh.
Q. In the state of Pennsylvania?
A. Yes, sir.
Q. How long have you been in the business?
A. With this firm or my entire life?
Q. Your entire life?
A. At least ten years.
Q. What other firms have you been with?
A. I have been with the A. & P. as buyer. I am in with Fascination Candy and Price Candy Company.
Q. Where is Price located?
A. He was over on Illinois Street, but he is out of business.
Q. And Fascination is located where?
A. They are over here, I have forgotten the name of the street. They have moved their factory.
Q. In the city of Chicago?
A. In the city of Chicago.
Q. By the A. & P. you mean the Great Atlantic and Pacific Tea Company?
A. Yes.
111 Q. How long have you been with Clark Company?
A. I have only been with them eight months.
Q. What territory do you cover for them?
A. I have metropolitan Chicago and surrounding towns as Gary, Kankakee, Joliet, Peoria, Aurora and Elgin.
Q. What product of the Clark Company do you sell here?
A. Candy bars, five cent bars, bulk numbers, and a few penny goods.

Q. Are you in position to state approximately the value per month of the goods you sell for the Clark Company which is shipped to the state of Illinois from the state of Pennsylvania?

A. Well, I can only give you six months, the figure they gave me.

Q. What does that come to?

A. That was a figure of, as I recall, around $52,000.

Q. That covers goods for which you take orders in the state of Illinois, transmit the orders to the home office in Pennsylvania, resulting in the shipment of goods from Pennsylvania to Illinois?

A. Yes.

Q. What class of trade do you call on?

A. Jobbers, wagon men, department stores and chain stores. With the jobbers I take in the tobacco jobbers also.

Q. In your experience in the candy industry you
112 have had occasion to learn about the operation of retail candy stores?

A. Oh, yes.

Q. You have observed that?

A. Yes.

Q. You are generally acquainted with various lines of candies?

A. Yes.

Q. The bar lines, the package lines, the candy goods lines?

A. Yes.

Q. I will ask you to examine a legend which is marked Commission's Exhibit 2-B, which accompanies a box of penny goods assortment called Ta-Ka Flyer in this state. (Handing document to the witness.)

A. Yes.

Q. It describes certain orange-centered chocolate creams and names twenty bars, and the purchaser of the 160 pieces, if he procures an orange-centered piece, receives therefor one of the larger bars and the last purchaser receives the half pound box of candy?

A. Yes.

Q. That is known as a break-and-take assortment. You are familiar with them?

A. Yes.

Q. You are familiar with the designation in the trade "break-and-take" as distinguished from candy not
113 sold in assortments, in other words, the straight candies?

A. That is right.
Q. Do you have break-and-take assortments?
A. No, sir.
Q. Are you personally opposed to them?
A. I am, yes.
Q. What is your reason?
A. Well, it hinders legitimate business and, of course, being a father of children, they don't get a fair break in their purchase when they go to the store; an inferior quality also.
Q. Do you have any other reasons in connection with the sale of break-and-takes to children?
A. Well, it takes away from the legitimate manufacturer of merchandise.
Q. As respects the children and the break-and-take assortment itself, do you have any other reason?
A. It promotes the thought of gambling, of course.
Q. In your years of experience in the candy industry, have you formed an opinion as to the effect which the volume of sales of break-and-take assortments has upon the total volume of sales of straight candies?
A. As to the dollars and cents value?
Q. As to the effect of the dollars and cents volume of break-and-take sales upon straight sales generally, 114 have you formed an opinion on that?
A. I have formed an opinion but as to the—I have never put any real value on that opinion, but I know it interferes.
Q. What is that opinion?
A. Well, I would say it interferes with business. As with this firm I represent, I would say it has taken away from my sales. I am not able to sell my penny goods in this market.
Q. From your experience in the candy industry, have you found that the failure to carry a break-and-take assortment has affected the amount of straight goods you have been able to sell?
A. Yes, it has. If I were to have one, I could really sell a lot of merchandise.
Mr. Kolinski: No further questions.
Examiner Furnas: Cross-examine.

Cross-Examination by Mr. Krein.

Q. What are the types of penny goods that you sell?
A. The items themselves?
Q. Yes.

A. I have caramels. I have some marshmallow goods and I have some chocolate covered numbers.

Q. How long were you with the Price Company?

A. I was with them from the start. They were
115 not in business very long. They were only in business, I would say, three months.

Q. Did they handle penny goods?

A. Yes, they started some. They started a couple of penny goods and also the bulk. They started also a break-and-take but it did not pan out at all, never left the factory.

Q. The Fascination Company, do they sell penny goods?

A. No, they have boxed goods.

Q. How long would you say you have been acquainted with companies, or working for companies, rather, that handle penny goods?

A. This is my first experience with penny goods.

Q. You have been working eight months?

A. With the Clark Company, yes.

Q. Your penny goods are sold in retail candy stores?

A. Yes.

Q. It is not true that the break-and-takes are candy of inferior quality?

A. All I have seen are, yes.

Q. Would you say that Bunte Brothers, the respondent in this case, are using their regular candy or inferior candy in their break-and-take assortment?

A. Compared to legitimate numbers, yes.

Q. The quality?

A. Yes, I would say so.

116 Q. You would say it was inferior quality?

A. Yes.

Q. Have you ever seen the inside of a Ta-Ka Flyer assortment?

A. I have not.

Q. Have you ever tasted the creams?

A. No, sir, I have not tasted them.

Q. Upon what do you base your opinion it is of inferior quality?

A. From the appearance, and, of course, from a conclusion I have come to on that, on the break-and-take.

Q. Generally?

A. Yes, generally.

Q. In other words, you assume every manufacturer of break-and-takes put inferior quality merchandise in his products; is that correct?

A. Yes, I would say so.

Q. Do you know how many manufacturers of break-and-take candy there are in Illinois?

A. No, I don't.

Q. Would you say it was a substantial number?

A. From all appearances of the jobbers' stock, I would say there are quite a few.

Q. Do you know how many manufacturers ship break-and-take candy into Illinois?

117 A. I don't.

Q. Would you say there was a substantial number?

A. If they go according to the state of Illinois, there must be.

Q. Are you acquainted with the Pippin candy put out by Bunte Brothers, a round piece of chocolate?

A. Sort of a sunflower?

Q. With creases on the top?

A. Like a sunflower?

Q. You are acquainted with that?

A. I have seen that brand, yes.

Q. Are you acquainted with B. B. Bats candy.

A. No.

Q. Are you acquainted with the one-cent Baby Ruths?

A. Yes.

Q. O-Henrys?

A. Yes.

Q. Butter Fingers?

A. Yes.

Q. Hershey bars?

A. Oh, yes.

Q. Did you know it is a fact those candies arose since the depression, those items?

A. Well, they are an offspring of the nickel bar, yes.

Q. They are competing now in Illinois?

118 A. Yes.

Q. With other types of candy?

A. Yes.

Q. Together with break-and-take candies?

A. Yes.

Q. And substantial numbers are sold in volume that you have seen and observed?

A. Yes, they are selling quite a few of them.

Q. Assuming the Commission issues a cease and desist order preventing the shipment in Illinois by Bunte Brothers, the respondent, of break-and-take assortments, assume that ceases, it is possible, is it not, for the respondent to

retain that volume by their other penny goods or by putting out a new and different product?

A. Speaking of the Bunte operations specifically?

Q. Yes.

A. Yes, their trade name alone would.

Q. Do you think from your observations in the candy industry and from the types of produet put out by the respondent, from the merchandising and advertising policies of the respondent, they would be able to retain the volume taken away by the break-and-take cease and desist order?

A. Well, immediately, no, but they would work up into that volume, yes.

Q. Temporarily, no, but eventually they would be
119 able to regain it?

A. Yes, sure. With the Bunte name in the trade, why, that is all that is necessary, as I see it.

Q. If the events occur that you so feel they will, in other words, Bunte eventually will regain that lost volume, no manufacturers in Illinois or outside of Illinois will be benefited by this cease and desist order, will they?

A. State that again.

Examiner Furnas: Read the question to the witness.

(The question referred to was read by the reporter.)

The Witness: Of course if they are put on the same basis with Bunte they will all have to start and fight. Of course, with Bunte's name here in Chicago they have an entree to start with.

By Mr. Krein:

Q. Do you know what percentage of any possible benefit might redound to intrastate manufacturers as contrasted with the interstate manufacturers?

A. No, I don't.

Q. How do the items of candy that you put out compare in quantity and quality with the newer items being put on the market?

A. Well, have you any specific manufacturer I should compare with?

Q. With the respondent.

120 A. They are on a par.

Q. You put out a bar equal in quality and quantity as the Pippin bar or piece of candy?

A. Well, the Pippin bar is a small piece. It isn't a length bar.

Q. I mean pieces instead of bars.

A. We don't have anything like that at all.

Q. Your candy would be in competition with such a piece of candy, would it not?

A. It would be a different piece entirely. Yours is a fondant cream, as I see it. We have no pieces similar to that. Ours is interwoven, any piece we have. It is a peanut butter interwoven piece we specialize on.

Q. Do you know the percentage of the penny break-and-take business in Illinois to the penny goods sold in Illinois?

A. If I could include the gum in there?

Q. I am speaking of the candy.

A. Just the confections? No, I don't know. No, I don't know.

Q. It is possible, is it not, if the cease and desist order is issued and there is a temporary lag before Bunte Brothers might regain that lost volume the Illinois manufacturers in the meantime in that temporary lag would be benefited?

A. If the salesmen are on their toes, why, it is possible they would benefit by it. How long a period, I don't know.

121 Q. Do you know the number of manufacturers in Illinois of penny candy?

A. No, I don't.

Q. Do you know that there is a substantial number of them?

A. Yes, sir, there are.

Q. You said the volume for the past six months in Illinois, the volume sold by you as a salesman for the Clark Company was around $52,000?

A. My first six months was, yes.

Q. What approximate percentage of that was exclusive of gum?

A. I haven't the gum at all. I just have the candy. The gum is handled by another salesman here in Chicago. It is a separate organization.

Q. Any possible benefit that might accrue to the Clark Company by the cease and desist order, if it is issued in this case, would purely be conjecturely in your mind?

A. Yes.

Q. And assuming that the respondent should regain any lost volume due to the cease and desist order, you feel your company would be substantially benefited?

A. Well, it would be more on an even footing, have a better chance.

Q. I am assuming the volume is recouped by Bunte

Brothers in that event would any benefit be derived
122 by the Clark Company?

A. Well, during that period it would be possible to get merchandise established and then it would be a fight to hold it.

Q. But the amount of volume that you think you might benefit by is purely conjectural, a matter of opinion?

A. Yes, sure.

Mr. Krein: That is all.

Examiner Furnas: Any further questions?

Redirect Examination by Mr. Kolinski.

Q. You do feel, though, if the respondent were to cease making these break-and-takes that outside manufacturers, as well as manufacturers in Illinois would have their fair chance to recoup some of the straight business that would result thereunder?

A. That has been taken away from them now, yes.

Q. Coming to the opinion as to the value of break-and-take assortments, the Ta-Ka Flyer assortment sells to the jobber at 85 cents. It consists, as the legend indicates, of 160 creams. Then you jump down to twenty bars and a one-half pound box of chocolates. The twenty assorted bars are valued at from three cents to five cents, the half pound box of chocolates at 25 cents. From your experience in seeing break-and-takes, what is your opinion
123 as to the relative value of the 160 chocolate creams on the basis of the other values I have given you?

A. Well, the way I consider these break-and-takes that I have seen and the prizes that are included therein, they never include any of their top-notch bars, it is always a second run bar.

Q. Do you also or have you also found the value of the prizes is such as to necessarily cause some deduction in value of the unit pieces?

A. Yes.

Q. Has that been your experience in observing break-and-takes?

A. Yes.

Q. You had that in mind when you so testified?

A. Yes.

Mr. Kolinski: That is all.

Examiner Furnas: Any more questions?

Mr. Krein: No, your Honor.

Examiner Furnas: Is that all?

Mr. Kolinski: Yes.
Examiner Furnas: You may be excused.
(Witness excused.)
Mr. Kolinski: I will call Mr. Dehm as my next witness.

124 J. J. DEHM was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Kolinski.

Q. What is your full name?
A. J. J. Dehm.
Q. Where do you reside?
A. Here and in Detroit.
Q. What business are you in?
A. Confectionery salesman.
Q. How long have you been in that business?
A. Close to fifteen years, between twelve and fifteen years. I don't call the first year or so, because I was not in it.
Q. What companies do you represent?
A. Smith Brothers.
Q. Smith Brothers Cough Drops?
A. That is right. Peter-Paul, Incorporated, Pulver Company.
Q. Smith Brothers are located where?
A. Poughkeepsie, New York.
Q. And Peter-Paul?
A. At Naugatuck, Connecticut. Also the Sweets Company of America.
Q. Give the location of the Pulver Company.
A. Rochester.
125 Q. New York?
A. Yes.
Q. Any others?
A. No, sir.
Q. Do you sell their products in the state of Illinois?
A. Yes.
Q. To what class of trade do you sell?
A. Confectionery jobbers.
Q. Are you in position to give the approximate figure of volume of goods of these outside manufacturers that you sell, which goods is shipped from the place of its manufacture in the respective states to the state of Illinois?

A. Well, $100,000.
Q. That is per year?
A. Yes.
Q. You take the orders for the products in the state of Illinois and transmit the orders to the home offices and the goods are shipped from the place of manufacture in New York or in Connecticut and shipped to the customers located here?
A. That is right.
Q. Prior to your engaging as representative for the four concerns you have named, prior to the last fifteen years, what was your occupation?
A. Coffee business.
126 Q. How long were you in that?
A. Oh, between seven and eight years, I judge.
Q. What class of trade did you call on in that business?
A. Retail.
Q. Grocery?
A. Yes.
Q. Somewhat of an allied line to candy?
A. No, sir.
Q. The distribution elements were entirely different, were they?
A. Yes.
Q. In your experience as a representative for the four candy companies you have named you have had occasion to learn somewhat of retail candy selling method?
A. Yes.
Q. You have had occasion to observe the operation of retail stores?
A. Yes.
Q. You are acquainted with what are known as assortments in the penny goods field, known as break-and-take assortments?
A. Yes.
Q. You know the distinction of terminology as contrasting break-and-take assortments from straight goods?
A. Yes.
127 Q. I show you Commission's Exhibit 2-B, being a legend which accompanies a box of penny goods called the Ta-Ka Flyer bar assortment.
(Handing document to witness.)
Q. You are familiar with that type of assortment?
A. Yes. Not this one, but I have seen the assortments.
Q. You are familiar with the principle of these assortments under which there are 160 creams, twenty of such creams having a different colored center, an orange center,

and the purchaser who procures a cream with an orange center accordingly receives one of the twenty assorted bar prizes?

A. Yes.

Q. The last purchaser receives the larger article, in the case of the Ta-Ka Flyer being a half pound box of chocolates?

A. Yes.

Q. Do you carry such break-and-take assortments?

A. No.

Q. Are you personally opposed to them?

A. Well, my feelings in the matter are such in view of the fact I formerly represented Kepple, who originally had the suit that when they discontinued them, why, I did.

Q. Have you any personal opinion on the subject?

A. Not especially. We don't sell them any more, so I realize there are times or instances where they are
128 sold where possibly something else could not sold but our plans, our method of operation is to establish brands.

Q. To sell on the basis of quality and service?

A. To sell on a basis of an establishment in the trade, trade mark brands on which we can establish and develop business which cannot be purchased from anyone but our own manufacturers.

Q. From your years of experience in the candy industry, have you formed an opinion as to the effect which the volume of break-and-takes sold on the market has upon the volume of legitimate straight goods sold? Have you formed such an opinion?

A. Yes, in view of the fact I formerly sold a great many.

Q. What is that opinion?

A. The opinion was as I mentioned to you before, while it produced income and was acceptable, then when it was discontinued, why, I went out with it, and of course I lost business. The opinion I had formed then was I was just, well, I was just out that much commission. It was extra business, or plus business, as we call it.

Q. What is your opinion as to the effect of the volume of break-and-takes now being sold in Illinois upon the volume of straight goods being sold?

A. Well, if I walk into a store to buy an item and I buy an assortment of pieces, any assortment, I haven't
129 bought the other product, that is true. If I buy one piece or another, that isn't my own. In other words, it is another item. From that angle I would say it is competition, although the effect would be I would not buy a

trade mark piece or some other number that I might have bought if that one had not been on the counter.

Q. From your experience it is your opinion the volume of break-and-takes to that extent detracts from the volume of straight goods being sold?

A. I don't know so much about volume, but that is bound to take business from other items.

Q. From your experience have you found the failure to carry a break-and-take assortment has affected your straight business?

A. Well, that is evident from the fact when the other concern went out of business that I resigned.

Mr. Kolinski: You may cross-examine.

Cross-Examination by Mr. Krein.

Q. With reference to Smith Brothers, do they sell any other product in Illinois through you besides cough drops?

A. Cough syrup.

Q. Such products are not in competition with confectionery products, are they?

A. Well, that depends on your idea of a cough
130 drop, whether you class it as a medical item or whether you class it as a confection.

Q. I mean this, a person wanting to buy candy would not purchase cough drops rather than candy, will he?

A. Well, I can say it is being done, yes.

Q. Does the Peter-Paul Company sell penny goods in Illinois?

A. Yes.

Q. What type of penny goods?

A. Caramels.

Q. Any others?

A. No, sir.

Q. What is the approximate volume of that company's business with reference to the $100,000 figure that you gave?

A. Well, I don't have the figures with me, but quite a few thousand dollars.

Q. The Pulver Company, does it sell penny goods in Illinois?

A. Chewing gum, penny chewing gum.

Q. Would you classfy that as a confectionery product?

A. I don't know whether you would. It is a kindred industry, or so considered, and a great many confectioners sell chewing gum of some type or other.

Q. The Sweets Company, does it sell penny goods?

A. Yes, the Tootsie Rolls and caramels. I don't
131 know whether you call a Tootsie Roll a caramel or whether you would not.

Q. What is the approximate volume of that penny goods of the Sweets Company?

A. As I say, I don't have the figures, but it is quite an appreciable volume.

Q. Would you say the total amount of penny goods done in Illinois through your company is under $5,000?

A. It would be over $5,000.

Q. Under $10,000?

A. Well, thereabouts.

Q. Are you acquainted with any other types of penny goods sold in Illinois?

A. I presume I would be.

Q. Are you acquainted with the Pippins put out by Bunte Brothers?

A. Yes.

Q. B. B. Bats?

A. Yes.

Q. One-cent Baby Ruths, O-Henrys?

A. Yes.

Q. Butter Fingers and Hershey bars?

A. Yes.

Q. Are you acquainted with the fact those products were put out in those sizes since the depression, rela-
132 tively new products?

A. Well, I don't remember.

Q. They are being sold in substantial numbers in Illinois at the present time, are they not?

A. I would say so.

Q. And competing with the rest of the candy being sold, are they not, in Illinois?

A. Yes.

Q. Including the penny break-and-take assortments?

A. Yes.

Q. Do you know how many manufacturers in Illinois manufacture break-and-take assortments?

A. No, sir.

Q. Would you say there is a considerable number?

A. I would not know.

Q. Do you know how many manufacturers outside of Illinois manufacture break-and-take assortments?

A. No, sir, I do not.

Q. Assuming that Bunte Brothers, the respondent in this case, is prohibited from manufacturing or selling penny break-and-take assortments in Illinois, it is possible,

is it not, for Bunte Brothers, the respondent, to retain that volume by selling their straight goods or by putting out a new and different bar on the market, is it not?

A. I would not know.

133 Q. Well, Bunte Brothers would have the same opportunity as any other company to get that volume of business alone?

A. I expect so.

Q. From your knowledge of the Bunte Brothers products and their merchandising and advertising facilities, would you say it was probable they would recoup that volume?

A. I could not tell you.

Q. It is also possible, is it not, that every manufacturer in Illinois might possibly benefit by the decrease in the volume of Bunte's business due to the break-and-takes sold?

A. It might be possible.

Q. Do you know how many manufacturers of penny goods in Illinois there are?

A. No, sir.

Q. You know there are a substantial number of them, don't you?

A. I assume there are.

Q. Do you know what percentage of any possible benefit might result to the interstate manufacturers as contrasted with the intrastate manufacturers in Illinois?

A. No, sir.

Q. Would you say it is purely a speculation, a matter of conjecture, whether or not a certain interstate manufacturer would be benefited at all and to what extent?

A. You say conjecture?

134 Q. Would it be a mere matter of opinion?

A. I imagine it would be.

Q. A guess? Would it be just a guess?

A. I would say so.

Q. In the event that the respondent was able to recoup the loss in volume due to the cease and desist order prohibiting break-and-takes from being sold in Illinois, is it not true no benefit would accrue to interstate or intrastate manufacturers of candy?

A. You say if they do not manufacture?

Q. If they did not manufacture but they were able to recoup that lost volume by their sales of regular penny candy or by new penny candy?

A. You mean the opportunity for the competitor would be just as great?

Q. No. I mean in the event that the respondent was able to recoup the lost volume by sales of his straight penny candies.

A. Yes.

Q. No resulting benefit would result from this cease and desist order to the manufacturer, either outside or inside Illinois, would it?

A. Apparently you mean the volume might be the same?

Q. I mean in the event that the respondent keeps the lost business by selling to those purchasers other
135 types of his penny goods and keeps that volume that was taken away by the cease and desist order, no possible benefit could accrue to any other manufacturer then, could it?

A. It appears as though it could not. That is right.

Q. Do you know the percentage of the penny break-and-take sales to the penny goods sold in Illinois?

A. No, sir.

Mr. Krein: I have no further questions.

Examiner Furnas: Do you have any questions?

Mr. Kolinsky: Yes, one further question.

Redirect Examination by Mr. Kolinski.

Q. From your experience in the candy industry, you do feel if the respondent ceased making the Ta-Ka Flyer bar assortment, of which he has made 86,000 units for sale in the state of Illinois in 1936, that the Illinois manufacturers and outside manufacturers of the type you represent would have a fair opportunity to recover some of that business? Maybe the question ought to be read.

(The question referred to was read by the reporter.)

A. I would say the same opportunity that the respondent would have to recover it.

Q. You feel you would be all on the same fair competitive basis?

A. Yes.

136 Mr. Kolinski: That is all.

Mr. Krein: That is all.

Examiner Furnas: You may be excused.

(Witness excused.)

Mr. Kolinski: I will call Mr. Keith T. Nichols as the next witness.

KEITH T. NICHOLS, was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Kolinski.

Q. What is your name?
A. Keith T. Nichols.
Q. Where do you reside?
A. 2002 Farragut.
Q. In the city of Chicago?
A. Yes.
Q. What business are you in?
A. Wholesale candy salesman.
Q. What company do you represent?
A. Hawley & Hoops.
Q. Where are they located?
A. 271 Mulberry Street, New York.
Q. How long have you represented them?
A. A year and a half.
137 Q. How long have you been in the candy business?
A. Selling candy a year and a half.
Q. Before that what business were you in?
A. Buyer for Fred Harvey.
Q. The restaurant people?
A. Yes, candy buyer.
Q. How long had you been in that position?
A. Ten years.
Q. Prior to that what was your business?
A. The Santa Fe Railroad.
Q. As candy buyer for the Harvey system approximately what volume of candy annually did you have occasion to buy?
A. The sales for the whole season run around $150,000 per month.
Q. Did that candy come from supplies that you arranged the purchase of?
A. Yes.
Q. For a period of ten years?
A. For a period of five years that I was in the candy end. I was with the company ten years.
Q. You were connected with the candy end of it?
A. I was in the accounting end of it prior to that.
Q. You are acquainted with the methods of retail distribution of candy?
A. Yes.

138 Q. You have had occasion in your business to visit candy stores?

A. Yes.

Q. Your present employment requires calling on what branch of the trade?

A. On the jobbing trade and the larger retail outlets, such as State Street.

Q. Do you cover the state of Illinois?

A. A small portion.

Q. Which portion?

A. As far west as Sterling to the state line, Wisconsin, and as far south as Lacon. That is about 29 miles north of Peoria.

Q. Just roughly the northeastern section of Illinois including the greater Chicago area?

A. Yes.

Q. Are you in position to state approximately what volume of your company's product you sell in this area?

A. Well, it has been such a short length of time. Last year it amounted to about $60,000 or $65,000.

Q. That covered the products of Hawley & Hoops which you sold in this state, for which you transmitted the orders to the home office in New York and it was shipped from the places of manufacture in New York to Illinois?

A. That is right.

139 Q. What are the types of goods that Hawley & Hoops manufacture and which you sell?

A. They manufacture gum arabic, jujube candy, crystalized creams and lacquered fudge pieces.

Q. Are some of those items known as penny lines?

A. The majority of them are, yes.

Q. In your experience in the candy business have you had occasion to learn of certain assortments of penny goods made up for sale at retail as break-and-take assortments?

A. Yes, I have.

Q. Are you familiar with the trade distinction between what is known as break-and-take assortments and straight penny goods?

A. Yes, I am.

Q. I show you Commission's Exhibit B-2, being a legend which accompanies a boxed assortment manufactured by the respondent called the Ta-Ka Flyer assortment with the designation of twenty orange creams thereon.

(Handing document to witness.)

Q. There is also reference to twenty assorted bars that are given as prizes to the purchaser of the orange cream and the last purchaser procures a half a pound box of

chocolates. You are familiar from this legend with that type of merchandise described?

A. Yes.

140 Q. Do you carry such a line?

A. I do not.

Q. Are you personally opposed to the break-and-takes?

A. Well, I am to a certain extent. It interferes with the sale of staple merchandise. I have found in places where I go in that I have been questioned if I carry penny draws, items of that nature. If I did they could give me a volume of business on it; otherwise not.

Q. It has been your experience that the volume of break-and-takes sold in your territory has an effect on the volume of straight goods sold?

A. Offhand, I would say yes.

Q. What is that effect?

A. Well, you mean in volume?

Q. What effect?

A. I have no way of knowing. I have never sold it. It don't know what the volume would be, but from the inquiries I had I would take it would mean quite a bit.

Q. Just from your observation of the industry what effect has the volume that goes into break-and-takes, what effect does it have upon the volume of straight goods?

A. Well, I could not answer that definitely, because I haven't sold any.

Examiner Furnas: Approximately, do you have anything in mind? You can answer.

141 The Witness: I should say about 10 per cent.

By Mr. Kolinski:

Q. Does that have any effect on the amount of straight goods that are sold?

A. Why, yes.

Q. What effect?

A. About that percentage of the effect on it.

Q. Does it detract or add?

A. It detracts from the staple line penny goods.

Q. Is it your opinion in your experience that your failure to carry a break-and-take assortment has affected the amount of straight business you have been able to sell?

A. Yes. If I had draws I could sell the draws and could sell merchandise along with them. If the weight of the goods does not make up a shipment, they would throw in a shipment of draws to make up the shipment. Otherwise they won't place the order.

Q. In your experience you have found if you carried a draw it would help you in carrying your straight goods?

A. Absolutely.

Mr. Kolinski: That is all.

Cross-Examination by Mr. Krein.

Q. What is the nature of the candy that you sell?

A. Jujubes, gum arabic, crystalized creams and
142 penny lines, lacquered fudge pieces.

Q. What percentage of the business that you do in Illinois consists of penny goods?

A. About 80 per cent.

Q. Has your company turned out in recent years a new kind of candy?

A. How?

Q. Any new types of candy?

A. New types? They have turned out new molds of the same standard but no new radical changes, anything of that kind.

Q. Has your merchandise ever been known in Illinois as staple merchandise?

A. Yes, considered as that alone.

Q. Has Hawley & Hoops ever advertised in Illinois?

A. They don't do any advertising at all except through trade journals.

Q. Your opinion that you would be able to sell straight candy if you had penny break-and-take candy is based upon facts?

A. On my actual experience from the customers inquiring if I had draws of the breaks-and-takes, as you call them.

Q. What effect should that have upon the desire of the consumers to purchase other types of candy?

A. They figure there is more inducement for children to buy that type of candy and they push it more.

143 Q. I mean you said you feel you would be able to sell more of your straight carry if you carried draws. Now, I ask you what facts do you have to base that feeling on?

A. For this reason, it is much easier to place a draw with a new customer than it is if you don't have draws.

Q. What effect should that have on your straight candy?

A. If you can't get an initial order, you can't get any repeat business. You have a little leeway, something to work along with. You have something to offer the jobbers.

Q. If you also had candy that was of good quality and quantity, something new and different, wouldn't the retailers want that in their stores?

A. They do to a certain extent, yes.

Q. Isn't it the fact probably the reason the straight goods are not being sold is not because you don't carry

draws but because the type of candy you are carrying is straight goods?

A. I would not say that. I figure if draws are eliminated and nobody had any draws there would be no inducement for them but to go on to other types of merchandise.

Q. If you did carry new and different types of candy, you admit the retailers would place orders with you?

A. Yes, they would.

Q. Have you ever heard of Bunte's Pippins?

A. I have.

144 Q. B. B. Bats?

A. Yes.

Q. One-cent Baby Ruths?

A. Yes.

Q. O-Henry and Butter Fingers?

A. Yes.

Q. Hershey bars?

A. Yes.

Q. Are you acquainted with the fact those are relatively new products put out since the depression?

A. Yes.

Q. They compete with candy in Illinois?

A. Yes.

Q. Substantial quantities are sold?

A. Yes.

Q. They compete with break-and-takes?

A. Yes.

Q. How does your candy compare in quality and quantity with those just mentioned?

A. They are entirely different types of candy. The bars you have mentioned are practically all chocolate items whereas I don't have any chocolate numbers.

Q. Do you think that now there is less of a demand for other items than chocolate candy than there was years ago?

A. You mean we don't—we want mostly chocolate today?

145 Q. Is that what you mean?

A. The trade?

Q. Today.

A. Well, from my limited experience in the selling end of it, I would say there has always been a certain percentage of people that do not prefer chocolate. I don't think there is any less demand for that type of candy than there has been heretofore.

Q. Isn't it true those types of products are able to compete, whereas the types of straight candy your company

sells are not able to compete by your own statement in the penny break-and-take industry and the straight candy goods industry?

A. Well, it isn't quite clear to me.

Q. You answered the question the Pippins and the B. B. Bats and the other pieces of candy that I mentioned are able to compete now even though there are break-and-takes on the market, whereas you say your straight candy won't be able to compete?

A. With the break-and-takes?

Q. And the other candies.

A. Well, I really think what I have been driving at is this: If you have a draw you can get your merchandise in, whether chocolate, or whatever it is, you can get it in, chewing gum or what have you. That is what I have reference to. There is no competition between jujube
146 candy and chocolate coated candy. They are two different types of candy altogether.

Q. Isn't it true there are penny candies sold on the market today, those I mentioned, where they are able to compete with the break-and-takes?

A. Yes.

Q. They are able to compete because the retailer wants that kind of candy, isn't that right?

A. That is right.

Q. You are not able to offer them that type of candy?

Mr. Krein: Let the record show the witness said no.

By Mr. Krein:

Q. Do you know how many manufacturers in Illinois manufacture break-and-take candy?

A. Well, about a half a dozen.

Q. That is pure guesswork, is it not?

A. Yes.

Q. As a matter of fact, don't you know there are a substantial number, more than a half a dozen?

Examiner Furnas: The witness testified a half a dozen. That is what he said.

By Mr. Krein:

Q. Is that your only opinion on the subject?

A. That is all.

147 Q. Do you know how many manufacturers ship break-and-takes into Illinois from outside of Illinois?

Mr. Kolinski: I will object to the question, just to have the record show it is incompetent and irrelevant.

Examiner Furnas: I did not get the question.

Mr. Krein: Do you know how many manufacturers ship break-and-takes into Illinois?

Examiner Furnas: Objection overruled and exception granted.

Mr. Krein: Off the record.

(There was a discussion off the record.)

Examiner Furnas: On the record.

The Witness: Outside of Illinois shipping in here?

By Mr. Krein:

Q. Yes. Do you know? I don't want any opinion.

A. Oh, ten or twelve.

Q. Do you know the percentage of the penny break-and-takes to the penny goods sold in Illinois?

A. No, I don't.

Q. Assuming that the Commission issues a cease and desist order preventing the respondent, Bunte Brothers, from manufacturing and selling in Illinois these break-and-take assortments, it is possible, is it not, for the respondent to retain that volume by selling his other penny goods or by putting out a new and different bar?

148 A. I don't think Bunte's would have any difficulty at all in overcoming what business they had short. From what I see of Bunte Brothers, that isn't a very large portion of their business, knowing the concern as I do and have known them a number of years.

Q. Assuming the amount of business they do is shipping in Illinois 86,000 units, do you feel Bunte Brothers would be able to regain that volume by shipping in Illinois other types of their candy?

A. I do.

Q. That is from your knowledge of the respondent, its type of advertising—

A. Yes.

Q. (Continuing) —its high quality of candy?

A. Yes.

Q. Do you feel it is probable that Bunte Brothers would regain that volume?

A. Yes, I do.

Q. In that event, no manufacturers either in Illinois or outside of Illinois would be benefited by the cease and desist order, isn't that correct?

A. That is right.

Mr. Krein: That is all.

Examiner Furnas: Anything further?

149 *Redirect Examination by Mr. Kolinski.*

Q. If Bunte were to stop making the Ta-Ka Flyer assortment, of which he made 86,000 units in the year 1936, do you believe that other manufacturers in the

state of Illinois and manufacturers outside of the state of Illinois, including the companies you represent, do you think such manufacturers would have a fair competitive opportunity to regain some of that business?

A. Yes.

Mr. Kolinski: That is all.

Examiner Furnas: Anything further?

Recross Examination by Mr. Krein.

Q. Assuming the opportunity is there, you feel Bunte Brothers would actually regain the business?

A. Yes, I do.

Mr. Krein: That is all.

Mr. Kolinski: That is all.

(Witness excused.)

Mr. Kolinski: I will call Mr. John Linder as the next witness.

JOHN LINDER was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

150 *Direct Examination by Mr. Kolinski.*

Q. What is your full name?

A. John Linder.

Q. Where do you reside?

A. 2141 Seminary Avenue.

Q. City of Chicago?

A. Chicago, the north side.

Q. What business are you in?

A. Candy brokerage.

Q. What company do you represent?

A. Boulevard Candy, Chicago.

Q. What other company?

A. Liberty Candy Company, Mueller Licorice, Cincinnati, and Illinois Nut Products Company, Chicago.

Q. The Mueller Licorice, Cincinnati, is the only company you represent located outside of the state of Illinois?

A. Yes. I have just taken on a new house, last Friday, that is the Vita Bran Corporation of New York. I have just taken that on. I haven't done anything with the line yet. I just had samples sent me.

Q. How long have you represented the Mueller Company?

A. Two years.
Q. What type of product do they manufacture?
A. Licorice.
Q. Do they manufacture a penny line?
151 A. Penny, yes, practically all penny, except one five cent package of licorice.
Q. They range in the field of penny confections?
A. Yes.
Q. Sold in candy stores?
A. Sold in candy stores.
Q. To what class of trade do you sell?
A. I sell to the jobbing trade, sell to jobbers and the jobbing trade.
Q. What territory?
A. All over Chicago, that is, metropolitan Chicago.
Q. Are you in a position to state approximately what volume of business in dollars you have sold of the Mueller Company product?
A. Well, I don't know. I could not give the exact figure on that.
Q. Just give us an approximation.
A. Oh, during the year I probably had about $400 worth of business due to—do you want to know? The freight from Cincinnati to Chicago amounts to about 2½ cents a box. For that reason I don't get the business here, because we have a concern in Chicago that puts out licorice that is right at the door without the freight.
Q. How long have you been in the candy business?
A. Twenty-eight years.
152 Q. Whom have you represented during that period?
A. Well, I was a jobber all these years up to the past eleven years.
Q. During the past eleven years you have represented other candy manufacturers?
A. I was a jobber for myself.
Q. You were acquainted with the retail method of selling candy?
A. Yes, I am.
Q. You are acquainted with the form of selling penny candy known as the break-and-take assortment?
A. Yes.
Q. You know the trade distinction between penny break-and-take assortments and straight goods?
A. Yes.
Q. From your experience in the candy business have

you an opinion as to the effect that the volume of break-and-takes sold on the market has to the volume of straight goods sold on the market?

A. Well, I will say that the break-and-takes or any of those draws, they really help in a good many of the different places. I know it has helped to stimulate business for a good many of them.

Q. Do you know whether it has any effect on the net volume of straight goods sold?

153 A. Well, now, I don't think so.

Q. Do you know whether it adds to the volume or detracts from it?

A. I think it adds to the volume.

Q. You think it stimulates it?

A. Yes, it does.

Mr. Kolinski: I guess that is all.

Examiner Furnas: Cross-examine.

Mr. Krein: I don't think I have any cross-examination.

Mr. Kolinski: I have a further question.

By Mr. Kolinski:

Q. Do you carry break-and-takes?

A. I have one push card I just handle just recently in the last year about November. Previous to that I had not had any at all. All of these years I was in the brokerage game I have never had any break-and-take.

Q. Your experience with a push card and what you have observed of break-and-takes sold in the metropolitan area of Chicago convinces you that they stimulate the sales of straight goods?

A. Yes, it has for me and I imagine it would for some of the others too.

Q. Would you say the failure to carry a break-and-take assortment has had any effect on your straight business?

154 A. No.

Q. Your failure to carry a break-and-take assortment, has that had any effect upon your ability to sell straight goods?

A. No, I don't think it has.

Q. It has not affected you either way?

A. No.

Mr. Kolinski: That is all.

(Witness excused.)

Mr. Kolinski: Mr. Rubey is the next witness.

JACK RUBEY was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Kolinski.

Q. What is your full name?
A. Jack Rubey.
Q. Where do you reside?
A. 1528 Fargo Avenue, Chicago.
Q. What business are you in?
A. I am a candy broker.
Q. How long have you been in that business?
A. The last six years.
Q. What companies do you represent?
A. George Close Company, Cambridge, Massachusetts.
Q. How long have you represented them?
155 A. Do you want the others? I represent others too.
Q. You might name the others.
A. Leo Agress, Incorporated, New York; Nu-Made Candy Company, Chicago; P. H. Wunderle, Philadelphia.
Q. Do these companies manufacture a line of goods known as penny lines?
A. They are all penny lines.
Q. Are you in a position to state approximately what volume of business you sold for these Massachusetts and Pennsylvania companies in the state of Illinois?
A. You mean in commissions or—
Q. In dollar volume.
A. In volume of business?
Q. Yes.
A. Per year?
Q. Put it on an annual basis.
A. Separately or combined?
Q. Combined.
A. Oh, I would say about $50,000.
Q. And that covers the goods sold by you in the state of Illinois?
A. In the metropolitan area. That includes Milwaukee, Aurora, Elgin, Joliet, Gary, Hammond, and those towns.
Q. What would the figure be just for all these towns included in the state of Illinois?
156 A. I would say 90 per cent of that.
Q. Possibly $45,000?
A. Yes.

Q. That covers goods sold in the state of Illinois and the order transmitted to Massachusetts or Pennsylvania, as the case may be, and the goods shipped from the place of manufacture in Massachusetts or Pennsylvania to the customers in Illinois?

A. Yes.

Q. Have you had occasion to become acquainted with the methods of retail selling of candy?

A. Well, just from personal observation.

Q. You see retail stores in your daily work?

A. No, sir.

Q. You don't?

A. Very little.

Q. You call on the jobbing trade?

A. Only.

Q. Are you acquainted with what is known as the break-and-take assortment?

A. I know what it is.

Q. I show you Commission's Exhibit 2-B, being the legend which accompanies the boxed assortment known as Ta-Ka Flyer assortment.

(Handing document to witness.)

157 Q. Are you acquainted with that type of assortment?

A. I have seen this package.

Q. You have seen that particular package?

A. Yes.

Q. You are acquainted with the fact twenty creams have an orange center and the purchaser of a cream with an orange center procures as a prize a bar?

A. I know some of the creams had different colored centers which were winners and the others were not.

Q. From your experience in the candy business, have you an opinion as to the effect that the volume of break-and-take assortments sold has upon the gross volume of straight goods sold in the candy industry?

A. Well, I do know that there is quite an amount sold. What the percentage is to the ordinary regular penny goods line that is being sold I can't give you any definite figures. I am not familiar with it.

Q. Do you know whether it has any effect on the volume of straight goods sold?

A. It has an effect on the volume of straight goods sold by others rather than on their own. It more or less, I think, stimulates their own.

Q. What effect does it have on the straight goods sold by others?

A. I think it has an effect. I think if a firm has
158 no draw it might affect their business by not getting as much.

Q. It detracts from the volume of straight goods sold by others?

A. That is my opinion.

Q. From your experience, have you found the failure to carry a break-and-take assortment has affected the amount of straight goods you have been able to sell?

A. Not to say I have noticed it, because I have been getting my share of other candy business in which this did not bother me in the least.

Mr. Kolinski: That is all.

Examiner Furnas: Cross-examine.

Cross-Examination by Mr. Krein.

Q. From your personal experience you feel if other manufacturers were able to push their straight penny candies in the same manner that you are able to push your straight penny candies, the break-and-take sales would not interfere with the amount of sales that you are doing?

A. Not with mine.

Q. I am assuming the other companies will have salesmen as capable as you are.

A. I don't think it is the capability of salesmen in a business. It happens to be what you think the kids want to buy. We don't sell directly to the consumer.
159 We sell to the jobber. We have had our flops. We have had our successes.

Q. In other words, if a company comes out with a type of candy that purchasers will buy they are still able to compete with the penny break-and-takes being sold, is that correct?

A. Providing it is a good size. In fact, sometimes where you find a consumer is getting something that is too much for the penny, others can't make, probably just as bad as the break-and-take.

Q. If a manufacturer has a line of candy that appeals to children, good quality and quantity, he will be able to sell it in Illinois regardless of the break-and-takes?

A. Yes, that is my opinion.

Q. Would you say the break-and-takes had any effect upon such a manufacturer?

A. Not that class of manufacturer. That would be my opinion.

Q. Wouldn't it follow a manufacturer who would be injured by breaks-and-takes would be injured not because of the break-and-takes, but because his candy as straight candy is not as appealable as other straight candy goods?

A. I think so.

Q. If a manufacturer does not have break-and-takes the straight candy that he has will still be wanted by
160 both the jobbers and retailers if it is the type of candy the purchasers will ask for and buy?

A. Yes.

Q. From your own experience you don't feel the elimination of break-and-takes in Illinois, even assuming over 86,000 are sold, will affect your business one way or the other?

A. The candy business is variable. I may have something that clicks today and next month it will not. It will drop. We have to have something else to take its place and I say at the present time it does not, but most likely probably next month or following it might.

Q. But not if you get something different?

A. That is right.

Q. In other words, the manufacturers who are being hurt by the penny break-and-take sales are manufacturers who do not put out the type of product that is appealable to the purchasers?

A. Yes.

Q. Have you ever heard of Bunte's Pippins?

A. Yes.

Q. B. B. Bats?

A. Yes.

Q. One-cent Baby Ruths and O'Henrys?

A. Yes.

Q. Butter Fingers and Hershey bars?

161 A. Yes.

Q. Are you acquainted with the fact those products were put out since the depression, in relatively recent times?

A. Yes.

Q. Those products are in competition with other candies sold in Illinois?

A. Yes.

Q. And substantial quantities are being sold in Illinois?

A. Yes.

Q. In competition with the penny break-and-takes?

A. Yes.

Mr. Krein: I don't think I have any further questions.

Redirect Examination by Mr. Kolinski.

Q. If the respondent who in 1936 marketed 86,000 units of the Ta-Ka-Flyer assortment were to cease manufacturing and selling that assortment in the state of Illinois, wouldn't that widen or expand the market to offer a fair competitive opportunity to other Illinois manufacturers and outside manufacturers such as you represent for that much goods?

A: Yes, in this respect to a certain extent. I do feel, I have no intention to find fault with Bunte in any particular case. He never affected my business regard-
162 less of their regular goods or the break-and-takes, but I imagine if that were eliminated they would find something else like Pippins, which sell so very nicely, to take its place, because they have a very large organization and they are always in with new ideas.

Q. In the meantime—

A. I do think the others will take care of a certain percentage of those 86,000 that had been eliminated.

Q. In other words, a fair competitive opportunity would be offered to the other remaining manufacturers, whether Illinois manufacturers or outside manufacturers, for their share of some of that business?

A. Yes.

Mr. Kolinski: That is all.

Recross Examination by Mr. Krein.

Q. It is possible, is it not, for Bunte Brothers to replace any lost volume if the cease and desist order is issued prohibiting their manufacturing and selling break-and-takes in Illinois to replace that lost volume with their other penny goods or with a new and different product, isn't that correct?

A. They might sell more of their regular lines that was existing at the time that this would have been withdrawn from the market, or it would have been placed
163 into some other new number.

Q. It is possible no benefit could be secured by either manufacturers outside of Illinois or in Illinois in the event that Bunte's would be able to regain any lost volume?

A. It is my own personal opinion.

Q. Will you say that Bunte's could regain that lost volume?

A. It is possible. It is possible they could develop a number that might be much better than this, as they have done those things in the past.

Q. From your knowledge of the respondent Bunte Brothers, the advertising and merchandising policies, the quality and quantity of their candies, do you think it is probable that they would be able to regain any lost volume due to the fact they can't manufacture or sell break-and-takes?

A. I personally think they could.

Q. In that event, none of that volume could go to any manufacturer either in Illinois or outside of Illinois, is that correct?

A. Yes.

Mr. Krein: That is all.

Mr. Kolinski: That is all.

Examiner Furnas: You are excused.

(Witness excused.)

Examiner Furnas: Any more witnesses?

164 Mr. Kolinski: No, that is all, your Honor.

Examiner Furnas: Anything further?

Mr. Kolinski: Nothing at this time.

Examiner Furnas: What time do you want to adjourn to?

Mr. Kolinski: Nine o'clock Central Standard Time.

Examiner Furnas: You will note this hearing is now adjourned until tomorrow morning at nine o'clock, Central Standard time, in room 1118.

(Whereupon, at 3:00 o'clock p. m., Central Standard Time, an adjournment was taken to reconvene at 9:00 o'clock a. m., Central Standard Time, Wednesday, May 5, 1937, at room 1118 New Post Office Building, Chicago, Illinois.)

167 BEFORE THE FEDERAL TRADE COMMISSION.

* * * (Caption—2695) * *

Room 1123 New Post Office Building,
433 West Van Buren Street,
Chicago, Illinois,
May 5, 1937.

Met, pursuant to adjournment, 9:25 a. m., CST.

Before:

Miles J. Furnas, Examiner.

Appearances:

P. C. Kolinski, attorney for the Federal Trade Commission.

Samuel G. Clawson, by LeRoy Krein, appearing for respondent. (105 West Adams Street, Chicago, Illinois.)

168 PROCEEDINGS.

Examiner Furnas: Let the record show that this is the reconvening of a hearing held yesterday in room 1118 New Post Office Building. Also note that counsel for the Commission and counsel for the respondent are both present. This hearing reconvened at 9:25 a. m., Central Standard time. Are you ready to proceed?

Mr. Kolinski: Yes, your Honor. I will ask that Mr. Wagner be sworn.

ARTHUR J. WAGNER was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Kolinski.

Q. What is your name?
A. Arthur J. Wagner.
Q. Where do you reside?
A. 162 Berteau Avenue, Elmhurst, Illinois. I am a little hard of hearing. That is why I am turning around with my right ear.
Q. What business are you in?
A. Salesman, candy salesman.
Q. Whom do you represent?

A. Charms Company, Bloomfield, New Jersey.

Q. How long have you represented them?

169 A. Since 1919.

Q. How long have you been in the candy business?

A. I was raised in the candy business.

Q. Just amplify that a little.

A. Well, thirty years.

Q. What was your first employment in the candy business?

A. With my father.

Q. Where was that?

A. Wahpeton, North Dakota.

Q. What line of business was that?

A. Wholesale candy and tobacco and cigars.

Q. Did you represent any other company other than Charms prior to 1919?

A. No.

Q. What had you been doing just before 1919?

A. I was in the army. I was a candy buyer and officer; a candy buyer for the Government for overseas. Prior to that I was with the artillery.

Q. You purchased at that time the candy requirements for the expeditionary force during what years?

A. Part of 1917, 1918 and 1919; not 1917, but 1918 and 1919. In 1917 I was with the field artillery.

Q. That is where the deafness came from?

A. Yes.

Q. What territory do you cover?

170 A. I make Wisconsin, Michigan, Indiana, Illinois, the river towns in the eastern part of Iowa and Missouri, with the exception of St. Louis and suburbs.

Q. Are you in a position to state approximately the volume of your company's product which you sell within the state of Illinois only annually?

A. Approximately, yes, about $100,000.

Q. Within the state of Illinois?

A. Yes.

Q. That covers products for which you take orders here, transmitting the orders to the plant in New Jersey where they are filled and shipped from there to customers in Illinois?

A. That is right.

Q. What class of trade do you call on?

A. Jobbers, wholesale, candy jobbers, tobocco; wholesale candy jobbers.

Q. About how many such jobbers in the state of Illinois do you call on approximately?

A. I would say approximately three hundred, three to four hundred. Maybe four hundred would be more like it than three hundred. That is including Chicago.

Q. Yes. You have had in your experience in the industry occasion to learn about retail selling methods in the sale of candies?

171 A. Yes.

Q. And you are generally acquainted with the retail store?

A. Yes.

Q. Are you acquainted with a form of assortment made up in the penny goods market called the break-and-take assortment?

A. Yes.

Q. You are aware of the trade distinction between assortments of penny goods made up as break-and-takes as distinguished from straight penny goods?

A. Yes.

Q. Have you seen such assortments in the state of Illinois?

A. Yes.

Q. Have you ever seen the assortment represented by Commission Exhibits 2-A and 2-B which is boxed in a box that size?

(Handing documents to witness.)

A. Yes, I have seen this.

Q. Reading the legend, you are aware that there are twenty of the 160 small pieces which carry an orange center, and the purchaser who procures one of those receives one of twenty assorted bars?

A. Yes.

Q. And the last person receives a half pound box

172 of chocolates?

A. Yes.

Q. That is the general principle of the break-and-takes that you have seen?

A. Yes.

Q. You have seen the particular break-and-take called the Ta-Ka Flyer in the Chicago and Illinois market?

A. Yes, I have.

Q. Do you sell a break-and-take?

A. No.

Q. Are you opposed to them?

A. Yes.

Q. What are your reasons?

A. Well, they take away the regular business from the regular penny goods business.

Q. Have you any other reason for being personally opposed to the break-and-take?

A. Well, the personal reason, I don't like the idea of the gambling. I have boys of my own and I don't like to have them gamble.

Q. From your experience in the candy industry in the state of Illinois, have you formed an opinion as to the effect of the volume of break-and-takes sold in Illinois upon the volume of straight goods sold in Illinois?

A. Well, that is a pretty hard question to answer.

173 I have never given it an awful lot of thought. I have been asked for breaks-and-takes or draws by jobbers where they would not buy straight merchandise.

Q. That has been in the state of Illinois?

A. Yes.

Q. By jobbers who have carried this break-and-take assortment?

A. I could not say that. I did not look in their stocks. I could not say whether they had the Ta-Ka Flyer in stock or not, but they had other draws.

Q. Do you know whether the number of break-and-takes sold in Illinois has any effect on the total volume of straight goods sold here?

A. I would say yes.

Q. What is that effect?

A. Well, jobbers will buy draws where they won't buy straight merchandise. They will go into a store, the kids will go buy draws where they would not buy straight goods.

Q. What effect does that produce then?

A. Well, it lessens the business on straight merchandise.

Q. From your experience in selling candies in the state of Illinois, have you found that your failure to carry one of these break-and-takes has had any effect upon your ability to sell straight goods?

A. Yes.

174 Q. What has been that effect?

A. Sir?

Q. What has the effect been?

A. Well, I have had jobbers ask me in the past year, in the last year or two, because we never had draws, they know it, but they asked me if I had draws, they would buy draws and maybe buy some other merchandise if I had draws to make up a shipment.

Q. So your failure to carry a draw has lessened the amount of straight business you have been able to sell?

A. Yes, I would say yes.
Q. And that is within the state of Illinois?
A. Yes.
Mr. Kolinski: You may cross-examine.

Cross-Examination by Mr. Krein.

Q. What kind of goods does the Charms Company carry?
A. Well, we make penny goods, nickel goods—I am telling you what we sell out here.
Q. Yes, in Illinois.
A. We make a lot of other numbers I don't sell in this territory. Penny goods, nickel goods, suckers and penny novelties, Christmas novelties.
Q. What percentage of your volume done in Illinois is done in penny goods approximately?
175 A. Well, better than 50 per cent. Of course, I am guessing at that. It may run 40 or 60. Right now in Chicago it is running about 90.
Q. Have you ever heard of Bunte's Pippins?
A. Yes.
Q. B. B. Bats?
A. Yes.
Q. One-cent Baby Ruths, O'Henry, Butter Fingers?
A. Yes.
Q. Hershey bars?
A. Yes.
Q. Are you acquainted with the fact those products have arisen since the depression, in rather recent times?
A. Have risen, the sales?
Q. The products themselves have just come out since the depression, relatively recently?
A. In the last how many years do you mean?
Q. Five years.
A. Pippins has. I know that has come out in the last five years, but Baby-Ruths—
Q. The one-cent Baby-Ruths.
A. I thought they came out before five years ago.
Q. Those products are being sold in the state of Illinois?
A. Yes, as far as I know.
Q. In substantial numbers?
176 A. Well, that I could not say just exactly what the amount is. Pippins is sold quite big. I don't know about Baby Ruths.

Q. You have seen them though in retail stores and jobbers?

A. Yes.

Q. They are competing with the other candy being sold in Illinois, is that correct?

A. Yes.

Q. Together with break-and-takes?

A. Yes.

Q. Do you know how many manufacturers in Illinois manufacture break-and-takes?

A. I would not say accurately, but I would say about twenty-five or twenty.

Q. Do you know how many manufacturers outside of the state of Illinois ship break-and-takes into Illinois?

A. That I could not say right now. There is none I know of that is shipping in Illinois right now. I don't know of any. A year ago there was quite a bunch of them.

Q. Do you know the percentage of penny break-and-take business to the total penny goods sold in Illinois?

A. That I could not say, no, right now.

Q. Could you at any time?

A. Well, yes. In the past I could say that the break-and-take, maybe a few years ago, was running maybe 177 50 per cent of the penny goods, 40 or 50 per cent.

Q. By the word "past" you mean how long ago?

A. Maybe three years, two years.

Q. Upon what facts do you base that opinion?

A. I am just giving more or less just from observation, trying to view the jobbers' stocks that I got into in the past and what I do now. I usually go into the jobber's stock in order to get an idea of the stock. I glance around and can usually tell what he has in stock, more or less.

Q. Did you ever see a jobber have 50 per cent of his stock in break-and-takes?

A. Pretty near.

Q. Which jobber?

A. That I could not say. I am not talking about Illinois in that.

Q. I am confining all of my questions to Illinois.

A. In Illinois, no, I could not give you that answer. I could say at least 10 per cent in one jobber's that I can think of right offhand in the past.

Q. Your figure of 50 per cent was not confined to the state of Illinois?

A. Not alone at that time, no. I was thinking of the individual jobbers I have seen other places.

Q. You are not in a position to state now that you know the percentage of penny break-and-takes to penny
178 goods sold in Illinois?

A. Right now, no, I could not, because I have not been down in the state for a few months. There has been a lot of break-and-takes taken off the market.

Q. In the past you think approximately 10 per cent in Illinois?

A. Oh, yes, 10 or 15 per cent in Illinois.

Q. Assuming that the Federal Trade Commission issues a cease and desist order forbidding the respondent, Bunte Brothers, from manufacturing or selling in Illinois break-and-take assortments, it is possible, is it not, for the respondent, Bunte Brothers, to retain that same volume by their sales of their own penny goods or by putting out new penny goods?

A. I could say yes.

Q. From your experience in the candy industry and from your observation of the Bunte Brothers' candy, their quality and quantity of their penny goods and their merchandising and advertising policies, would you say that it is probable that that volume would be retained?

A. If they take off the—

Q. The penny break-and-take goods.

A. Yes, they would maybe get more business.

Q. Would that same amount of volume be retained by Bunte Brothers exclusively?

179 A. Yes.

Q. Even assuming a large number of boxes had been sold of the penny break-and-takes?

A. Yes.

Q. In that event, if the respondent would be able to regain that volume, no manufacturers in Illinois or outside of Illinois would benefit by the cease and desist order of this Commission, would they?

A. I should think they would benefit by it.

Q. Assuming Bunte Brothers retained that same volume by their sales of other goods?

A. They would have a more equal footing to sell regular merchandise. The only way Bunte Brothers would be able to retain their volume would be by making good merchandise, such as Pippins, and putting things out like that.

Q. Do you think there is an opportunity for other manufacturers to get that volume?

A. Well, there is also opportunity for any manufac-

turer to put out a good number to take anybody's business.

Q. You think it is probable Bunte Brothers would be able to regain all the lost volume?

A. Yes, with their reputation they ought to be able to regain all that lost volume.

Q. If they did, they would not lose by the cease and desist order, nor would any manufacturer gain by it,

180 isn't that correct?

A. Well, there may be some other manufacturer would come out with another new number which could take a part of that business away from Bunte, yes, if Bunte did not come out.

Q. Isn't it true manufacturers who do come out with a good number are able to compete in the market with break-and-takes?

A. Not necessarily. If they get something "hot," yes, what you mean by a big value or a "hot" number, they can take business, but they have to do it for less and the salesmen sometimes have to do it at a loss.

Q. Would you say the company that is putting out B. B. Bats is losing money?

A. I would not say they are losing money, but they are not making a big volume of profit, I imagine.

Q. Do you think that Curtiss is making a big profit on Baby Ruth and Butter Fingers sold by that company?

A. Not from the stories they are telling. I have never seen their books, but I know we as salesmen have had to take a cut on commissions to get out big merchandise to compete.

Q. Any possible benefit that might be derived by you, though, is purely conjectural, isn't it?

A. Yes, more or less.

Q. More or less a guess?

A. On my part?

181 Q. Yes.

A. Well, no, not necessarily a guess. If we can get out a big value, why, we can get the business.

Q. If you got that big value out at the present time could you get the business?

A. Well, yes, but it is a little short profit proposition and short commission proposition then for the salesmen.

Q. That increased volume and short profit will net you more?

A. We would have to do an awful lot, have to do twice the amount of business. I have right now, I have a "hot"

number, and I have to take 2-1/2 per cent commission on it. I would be glad to do half the amount of business.

Q. Do you know what percentage of any possible benefit might be derived by interstate manufacturers as contrasted with intrastate manufacturers?

A. On pick-and-draw?

Q. In the event Bunte is ordered to cease making break-and-takes in Illinois?

A. Well, it would help out of state manufacturers, I should imagine, and intrastate too.

Q. You are not in position to be positive of any percentage that might be derived by interstate manufacturers as contrasted with intrastate manufacturers?

A. Well, no, I would not know exactly, of course,
182 but my own belief is it would, my own personal opinion.

Q. In your opinion, what is the largest and most important candy center in the United States?

A. Right now it is Chicago in volume of production.

Q. You are unable to compete at the present time with such candy as Pippins, B. B. Bats and the other penny goods that are being sold?

A. Well, B. B. Bats, you have big value there. Pippins, you have good value. What I mean is Pippins is darn good candy. B. B. Bats, personally, I don't think so much of it but they are big values for a penny compared with a penny's worth of Ta-Ka Flyer, a little piece in that.

Q. Have you ever seen the inside of the Ta-Ka Flyer assortment?

A. Yes.

Q. Is it a fact the Illinois trade demands draws?

A. Well, they have in the past, yes, but in the last few trips I have made, of course, we have not been making them, I have not been asked for any draws because they know that.

Q. How often do you travel in Illinois?

A. Approximately in the cold weather, the winter months, about every eight weeks. During the heat of the summer, June and July, why, I usually make it about every ten weeks and in Chicago I am in the northern part of the state, and like in Chicago, I am in here every
183 other week or maybe out two weeks and in a week.

Q. It is possible, is it not, for every Illinois manufacturer to derive some benefit from the decrease in the sales of the penny break-and-takes by Bunte, is it not?

A. I should imagine so, yes.

Q. And although you feel there is the opportunity for the interstate manufacturers to sell more straight candy, the amount is conjectural and subject to a mere matter of opinion?

A. Yes.

Q. It is a fact that at the present time candy companies are able to compete by putting out the kind of candy that the purchasers want and ask for?

A. Yes.

Q. Isn't it probable that the failure of your company to be able to sell a straight candy is due to the fact the straight candy it sells is not in sufficient demand by the purchasers rather than the few interstate sales by Bunte?

A. No, I have some numbers that are selling very big, a big demand.

Q. Do you think the break-and-takes stop the sales of that?

A. It has at certain places, yes.

Q. Those candies that you mentioned that you say sell big are those penny items?

184 A. Yes.

Mr. Krein: That is all.

Examiner Furnas: Any thing further?

Redirect Examination by Mr. Kolinski.

Q. Have you ever seen the small pieces which constitute the 160 count?

A. Yes, I have.

Q. Do you consider them a good penny value?

A. No, I don't, not against Pippins.

Q. Isn't it a practice in making up break-and-take assortments to add values to the prizes?

A. Yes.

Q. In the Ta-Ka Flyer the twenty bar prizes are testified to as being worth from three cents to five cents each and the half pound box of candy 25 cents.

A. Yes.

Q. This disproportion of the prizes causes a deduction in value of the units?

A. Yes.

Q. That you have found to be the case?

A. Yes.

Q. In the Ta-Ka Flyer assortment the small 160 count creams you do not consider a full penny value?

A. Not if you take it against Pippins. It will take 185 four of these to make one Pippin in weight.

Q. The Pippin is also manufactured by Bunte Brothers?

A. Yes, and it is a good one.

Q. You are clear in your mind that if the respondent, who marketed 86,000 units of this Ta-Ka Flyer assortment in the state of Illinois in 1936, if he would have stopped making these there would be a fair competitive opportunity to regain that business for other manufacturers in the state of Illinois and other manufacturers located outside of the state of Illinois?

A. Yes.

Mr. Kolinski: That is all.

Recross Examination by Mr. Krein.

Q. Isn't it true the Pippins and the creams in the Ta-Ka Flyer assortment are different types of candy entirely?

A. Yes, a little different in the texture, yes, and the manufacture.

Q. The manufacturing process is different?

A. Yes.

Q. The size of candy does not indicate the quality, does it?

A. Not always, no.

Q. If there is a small piece but a better quality, it is of equal value to a large piece but of lesser quality?

186 A. Yes, if it is. I don't think this cream here is a quality that Pippins is by any mean.

Q. Have you ever tasted one?

A. Yes, and tasted Pippins both.

Q. You just said you do feel there would be opportunity for interstate and intrastate manufacturers to compete and secure the volume of business that Bunte has lost by the break-and-takes temporarily?

A. Yes.

Q. But you did say you feel the respondent would be able to regain that volume?

A. Yes, with the type of merchandise that they make, like in their place the Pippins. I should say they ought to be able to regain that all on Pippins alone pretty near.

Q. Or by putting out a different product?

A. Or putting out another product.

Q. Or pushing and advertising their straight penny goods?

A. Yes.

Q. It is conjectural and a matter of opinion in your mind as to the percentage that the interstate or the intrastate manufacturers would secure, if any?

A. Yes.

Mr. Krein: That is all.

Redirect Examination by Mr. Kolinski.

187 Q. It is not conjectural in your mind the moment Bunte stops making and selling in Illinois 86,000 units of this Ta-Ka Flyer assortment, it is not conjectural in your mind at that moment there would be fair and equal opportunity to recoup that business by straight goods being bought of your state and interstate manufacturers?

A. Not right away.

Q. Right away you would be on an equal footing?

A. Yes, we would all be on an equal footing then.

Mr. Kolinski: That is all.

Mr. Krein: That is all.

Examiner Furnas: The witness may be excused.

(Witness excused.)

Mr. Kolinski: I will call Mr. Barney Sands.

BARNEY SANDS was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Kolinski.

Q. What is your name?

A. Barney Sands.

Q. Where do you reside?

A. In Chicago; residence address, 6244 Winthrop Avenue, Chicago.

Q. What business are you in?

188 A. Selling candy to the wholesale trade or jobbers.

Q. How long have you been in that business?

A. About twenty-five years.

Q. What companies do you represent?

A. The R. E. Rodda Company, the Lancaster Company, well, the American Caramel is the same thing, they own the same thing, and John Dockman & Son, 32 East Montgomery Street, Baltimore, Maryland. Do you want the names of the firms I have just taken on?

Q. How long have you represented these concerns?

A. Since last October.
Q. The American Caramel and John Dockman?
A. Since last October.
Q. Are you in position to state what volume of business you have done?
A. I have not been doing very much volume, I can tell you, because I have been out, you know, for about six months. I am just developing their line. It would not amount to, the two combined, I don't think they will amount to over $15,000.
Q. For the six months period?
A. Yes, that is all. I am just developing their line for them.
Q. Does that cover goods shipped into the state of Illinois?
189 A. Yes, into the state of Illinois.
Q. It includes orders you procure in Illinois which you transmit to the plants at Maryland and at Pennsylvania—
A. Yes.
Q. (Continuing.) —and the goods are shipped from there to Illinois?
A. Yes.
Q. How is that divided between the two, approximately?
A. Well, about two-thirds of that goes to Lancaster.
Q. Pennsylvania?
A. Yes.
Q. And the remaining third to Dockman Company at Maryland?
A. Yes.
Q. What class of trade do you call on?
A. Wholesale candy houses, tobacco houses.
Q. About how many such do you call on in the state of Illinois?
A. Well, I just take the northern part. I should judge about one hundred.
Q. What other companies have you represented in the past twenty-five years? Name a few.
A. Well, I have represented the Fair Play Caramel Company and the Ohio Confection Company, the Shelby Gum Company and the National Candy Company of Grand Rapids, Michigan, the Putnam factory.
190 Q. All of your twenty-five years have been spent selling candies in this area?
A. Yes. Well, no, I used to work twelve or thirteen states.

Q. But Chicago?
A. Not Chicago, either.
Q. How long have you been in the Chicago area?
A. Practically about six months or so.
Q. How long have you resided here?
A. I have resided here about seven years.
Q. The territory you have covered has included what states?
A. Well, Illinois, Wisconsin, Minnesota, North Dakota, South Dakota, Nebraska, Iowa, Kansas and Missouri.
Q. How much of your candy selling experience has been in the state of Illinois?
A. Well, about that same twenty-five years.
Q. It is just the recent several months it has been in Chicago?
A. That is because I wanted to plant this for my brother in Chicago and I would go out, but he passed away and I just started in. I am just developing these lines for them.
Q. In your experience in the candy industry you have become acquainted with the methods of retail selling of candy?
A. I have only sold to the jobbing trade. I have contacted them in a small way, but much. I get an idea
191 of it, that is all, the jobber salesman's idea. It would be just the same as if I called on them.
Q. The jobber reports to you the wants of the retailer?
A. Yes.
Q. You are acquainted with a type of assortment in the penny goods field known as the break-and-take assortment?
A. Yes.
Q. And you are acquainted with the trade designation or break-and-take assortment as being distinguished from straight goods?
A. Yes.
Q. The straight goods being accompanied by no break-and-take features?
A. Yes, no break-and-takes.
Q. Have you seen the break-and-take assortment in the Illinois territory that you cover?
A. Oh, yes.
Q. Have you ever seen the assortment identified here as Commission's Exhibits 2-A and 2-B, known in this case as Ta-Ka Flyer?
A. Well, that is orange, I believe.
Q. You have seen that in the state of Illinois?
A. Yes, I have.

Q. You are familiar with the operation of the assortment, twenty of the 160 creams are orange-centered and the purchaser of those is entitled to one of twenty as-
192 sorted bars and the last purchaser procures the half pound box of chocolates?

A. Yes.

Q. From your experience in selling in the state of Illinois, have you an opinion as to the effect of the volume of break-and-takes sold in this state upon the volume of straight goods and the penny class field sold in Illinois?

A. You mean in the past year or the past five or six years?

Q. In recent years up to the present.

A. In recent years in the penny line it was about 75 per cent of the business. That is going back a few years.

Q. Have you an opinion on the effect of the volume that goes into the break-and-take has upon the straights?

A. Well, I would judge it is about, coming in contact with the jobbing trade, you know the type of people they sell, I think it would be 70 to 75 per cent anyway, or 65 per cent anyway. I judge so.

Q. Are you in a position to state what effect the amount of break-and-takes sold in this state has upon the total volume of penny goods that can be sold here in the state of Illinois?

A. Well, I can't say for the whole state, because I am not covering the whole state.

Q. For the city of Chicago, as far as your experience goes.

193 A. There isn't as much sold as there were years ago, you understand—

Q. Yes.

A. (Continuing.) —but I should judge right here in the city, about 35 per cent of the business is break-and-takes. I should judge so. I don't know. It is hard to just exactly tell.

Q. Does the amount of volume of break-and-takes sold here add to the volume of straight penny goods or detract from it?

A. It detracts from it.

Q. That is your experience, your opinion from your experience?

A. Yes, it detracts because I found that out when I just take the Dockman line. He had some break-and-takes. He immediately told me not to sell them. I could sell a world of them at that time. Of course, I would have sold

it. They all wanted break-and-takes. It just knocked us out entirely.

Q. At the present time when you get out in the field, do jobbers ask you for break-and-takes?

A. Well, they know I haven't any, because I told them when I had Dockman's line I haven't. They knew I discontinued it immediately. In fact, I didn't sell any. I did not have an opportunity.

Q. You see the break-and-take assortments in the shops of the various jobbers that you call on, do you?

194 A. Oh, yes, there are break-and-takes there.

Q. Have you found from your experience in selling in the state of Illinois that your failure to carry a break-and-take assortment has affected the amount of straight goods you have been able to sell in Illinois?

A. Absolutely.

Q. In what way has it affected it?

A. Well, it has affected it because, well, an item that you have might prove staple and all of a sudden somebody comes in with a break-and-take and takes it away from you, and the consumer, of course, goes after, they gamble after that particular big item that they get for the last.

Q. So you would say it has handicapped you somewhat?

A. Yes, it has.

Q. Has it caused you to lose orders at times?

A. Well, I find I have lost orders because my goods would not move as fast on account of these break-and-takes. My repeat orders would not be so good on account of them.

Mr. Kolinski: You may cross-examine.

Cross-Examination by Mr. Krein.

Q. Did you ever represent the Fair Play Company?

A. Yes.

Q. They now manufacture the B. B. Bats?

A. Yes.

195 Q. That is in competition with other candy being sold in Illinois?

A. Well, in what way?

Q. It is being sold in Illinois?

A. Oh, sure.

Q. In substantial quantities?

A. Yes, it is.

Q. B. B. Bats are competing with the other types of candy sold, including the break-and-takes, is that correct?

A. Well, everybody's candy is competing with the break-and-takes.

Q. They are able to sell large quantities in Illinois of B. B. Bats?

A. Well, there have been. I don't know what they are doing now. I don't know whether you have their figures or not.

Q. Are you acquainted with the Bunte Pippins?

A. Yes.

Q. That candy is being sold in Illinois?

A. Yes.

Q. In large quantities?

A. Well—

Q. You see it when you go to your jobbers?

A. Yes, you see the Bunte Pippins.

Q. And it is competing in Illinois at the present time against break-and-takes?

196 A. Well, all those—well, every item is a competitive piece to one another, isn't it?

Q. But they are being sold in large quantities despite the break-and-take sales?

A. I don't know how they are selling.

Q. But you see them when you go to the jobbers, don't you?

A. I don't look through the jobbers' stock, or I don't look through their stock thoroughly.

Q. But you have seen them at jobbers'?

A. Yes.

Q. Does Rodda Company put out an item similar to the Pippins?

A. Yes.

Q. Is it called Jewels?

A. Yes, Mint Jewels.

Q. Are large quantities being sold in Illinois?

A. Well they have discontinued them.

Q. They have discontinued them in Illinois?

A. They have discontinued them everywhere.

Q. You just made a statement a little while ago you don't examine the jobber's stock very carefully.

A. I don't go through the entire stock.

Q. What facts do you have to base your opinion at any time in Illinois that 75 per cent of the penny goods consisted of break-and-takes?

197 A. Well, at one time the jobbers—of course, I don't know at this moment what the per cent is, because I don't investigate it entirely, but I know it hurts my sales.

Q. What facts do you have upon which you base your opinion?

A. In the penny goods line the fact is when you are selling the penny goods the break-and-takes hurt your sales when you haven't got any.

Q. What facts do you have upon which to base your opinion that 75 per cent of the penny goods consisted of break-and-takes at any time?

A. When I have to travel consistently in the whole state of Illinois pretty near all the candy business was involved in these break-and-takes as far as penny goods was concerned.

Q. What jobbers' stock did you ever see that consisted of 75 per cent break-and-takes?

A. The jobbers' salesmen I used to sell, these wagon jobbers used to pile about 70 per cent of their business in break-and-takes. That is all they wanted at one time. Of course, I don't know just exactly what it is now at this moment.

Q. Your present recollection is you don't know any jobbers that you have seen that have 75 per cent of their stock that handled a substantial amount of candy?

A. Well, I don't know. I made that statement 75 198 per cent, I don't know whether their stock consisted of 75 per cent, no, but I claim it hurt my business to a great extent. If you were selling penny goods you would know it too.

Q. It handicaps you to the extent of the fact you haven't a break-and-take to offer, is that correct?

A. It does.

Q. In other words, if you had a break-and-take to sell, you would be able to sell those break-and-takes?

A. Yes, absolutely.

Q. To that extent it hurts your business?

A. Yes. It hurts my part of the business because I haven't got it. They buy it in preference to the other one. They push that harder because they know the kids like to gamble.

Q. Have you an outstanding selling piece of candy at the present time?

A. Yes, I have.

Q. What is it?

A. I have Rodda's Moon Faces and Cooneys.

Q. You are able to sell a considerable number in Illinois?

A. In this territory I sell quite a good deal.

Q. In competition with the break-and-takes?

A. They are in competition with me. I am not in competition with them.

Q. But the candy is being sold at the present time?

A. Yes, I could sell more of that if it were not for
199 the break-and-takes.

Q. Do you know how many manufacturers in Illinois manufacture break-and-takes?

A. No, I don't.

Q. Would you say it is a substantial number?

A. I don't know exactly. In Chicago here there are Sobel, I believe, and Bunte's—

Q. I asked for the number. I don't care for the names.

Mr. Kolinski: If you know just give the number.

The Witness: I don't know. There may be four or five here in the city, or six. I don't know just how many.

By Mr. Krein:

Q. Do you know how many manufacturers outside of the state of Illinois ship break-and-takes into Illinois?

A. No, I don't know.

Q. Would you say there is a substantial number?

A. No, I would not say that. I don't know of anybody that is shipping into this state.

Q. You are acquainted with Bunte's Pippins?

A. Yes.

Q. B. B. Bats?

A. Yes.

Q. One-cent Baby Ruths, O-Henry, Butter Fingers?

A. Yes.

Q. Hershey bars?

200 A. Yes.

Q. Are you acquainted with the fact these products have arisen in recent years since the depression?

A. Well, they have been going up pretty well, yes.

Q. They have been selling in considerable quantities in Illinois?

A. I don't know how much they have sold.

Q. But you see them around?

A. You see them around. I don't know how much they sell.

Q. Do you see them at every jobber that you go to?

A. I was not looking for them.

Q. Do you know the percentage of the penny break-and-take business to the penny goods sold in Illinois?

A. Not exactly, no. I only cover this small territory.

Q. You have seen break-and-takes in the jobbers that you call on?

A. Yes.

Q. Others than put out by Bunte?

A. Others than Bunte's, yes.

Q. Are there a considerable number other than Bunte's that sell break-and-takes to jobbers?

A. Well, I don't know how many.

Q. Assuming that the Commission issues a cease and desist order preventing Bunte from manufacturing and selling in Illinois—

201 A. Yes.

Q. (Continuing.) —break-and-take assortments—

A. Yes.

Q. (Continuing.) —it is possible, is it not, for the respondent, Bunte Brothers, by selling their other straight penny goods or by putting out a new and different item to retain that same volume, is it not?

A. If they all do, I think if they would all do that they would be better off.

Q. From your knowledge of the Bunte Brothers products and their merchandising and advertising methods and the quality and quantity of their pieces of penny candy, do you consider it probable that Bunte Brothers would be able to retain any lost volume?

A. I don't think they would. If they would all stop it they would be all on an equal basis. No, I don't think they would be prevented at all with the items that they manufacture. I think they would all get together, because they manufacture a nice line of merchandise, it is well known, I think if they would all quit it, I think they would all be better off. Their volume would be just about the same, I think.

Q. You think their volume would remain the same?

A. I think they would get the volume just the same if they would all quit manufacturing these break-and-takes.

202 Q. In the event that Bunte Brothers alone were ordered to stop manufacturing and selling break-and-takes and in the event that they did retain that volume, no benefit would be derived by manufacturers in Illinois or outside of Illinois, would it?

A. Well, I think if they would all have to quit manufacturing—

Q. I am assuming, though, that the facts of the case are that there is a cease and desist order issued against Bunte's so our assumption here is if Bunte alone were ordered to cease and desist making penny break-and-takes, if they did retain that same volume by pushing other pieces of merchandise, would any benefits be derived by any manufacturers either in Illinois or outside of Illinois?

Mr. Kolinski: Just a minute. I submit the witness has answered the question. The witness has answered if all other manufacturers ceased making break-and-takes, Bunte would probably have the same advantage. If Bunte were to stop alone he would be in the same position a number of other manufacturers now are. The witness has consistently answered the question.

Examiner Furnas: I understood the witness in answering—I don't want to interfere with your defense or cross-examination.

Mr. Krein: The witness is going on the assumption in the last two questions, he is assuming all manufacturers of break-and-takes are ordered not to make them. In this case we have to deal with the facts that Bunte alone were ordered to stop making this and if that volume is retained by Bunte.

203

Examiner Furnas: You are asking him if Bunte is prohibited from making a break-and-take and selling it in Illinois would Bunte be able with another line or another product to take the place of the break-and-take that he was selling. Is that it?

Mr. Krein: That is right.

Examiner Furnas: Do you understand it that way?

The Witness: I still maintain they should all stop it instead of Bunte.

Examiner Furnas: You don't answer his question. He is asking if Bunte alone is so prohibited.

The Witness: I think if they would stop it alone and the others would continue these draws, that it would affect Bunte's the same as it affects other firms.

Examiner Furnas: Pardon me for the interruption.

The Witness: Am I answering it?

Mr. Kolinski: I think it is a perfect answer to your question. It shows the witness is consistent.

The Witness: I have never been on the witness stand. I might get befuddled. I don't want to. I am not so good.

204

Examiner Furnas: You are all right. I didn't mean to interrupt you.

Mr. Krein: That is all right.

By Mr. Krein:

Q. In the event the cease and desist order would be issued prohibiting the selling of penny break-and-takes in Illinois on the part of the respondent, any possible benefit that might be secured would be by manufacturers inside of Illinois as well as outside of Illinois?

A. You want to know whether it would affect them if these break-and-takes would cease?

Q. By Bunte.

A. By Bunte? Well even if Bunte would cease it would help other people in selling their merchandise.

Q. And the possible benefit would go to manufacturers inside of Illinois as well as manufacturers outside of Illinois?

A. Outside of Illinois, and I think if they would all cease we would all be on an equal basis and I think Bunte's would do just as much business in the end.

Q. You feel though if Bunte alone ceased selling break-and-takes that he would have to compete with the other break-and-takes in Illinois, assuming that they go on?

A. As long as they continue he would have to compete with them.

205 Q. From your knowledge of his products and his merchandising policies, don't you feel though that their candy will be able to be sold in as large quantities to make up the decreased volume that they lost when the penny break-and-takes were eliminated?

A. They would provided the others would cease, I think. I would like to see them on an equal basis.

Q. If the others did not cease, from your experience and knowledge of the respondent, don't you think they would be able to compete against break-and-takes, the same as B. B. Bats, penny Baby-Ruths, penny O-Henrys, penny Butter Fingers and penny Hershey bars?

A. Well, I feel as though the reason why they have these break-and-takes is to compete with the others to keep up their volume. They would not have them, would they? Of course I am asking you the question. You should ask me.

Mr. Krein: That will be all.

Mr. Kolinski: That will be all.

(Witness excused.)

Mr. Kolinski: I will ask for a short recess.

Examiner Furnas: We will take a short recess.

(Whereupon a short recess was taken.)

Examiner Furnas: Are you ready to proceed?

Mr. Kolinski: Yes. I will call Mr. Oscar R. Kuehn.

206 OSCAR R. KUEHN was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Kolinski.

Q. What is your full name?
A. Oscar R. Kuehn.
Q. Where do you reside?
A. My resident address is 134 South Park Street, Fond du Lac, Wisconsin; business address, 79 East First Street, Fond du Lac, Wisconsin.
Q. What business are you in?
A. Manufacturing confectionery.
Q. What company are you connected with?
A. The Bonita Company.
Q. They are located at Fond du Lac?
A. Right.
Q. What office do you hold with that company?
A. Secretary-treasurer.
Q. You are present here under subpoena that was issued by the Commission?
A. Right.
Q. How long have you been in the candy business?
A. Twenty-five years.

Q. You are familiar with an assortment of penny
207 goods called the break-and-take assortment?

A. I am.
Q. And you are familiar with the trade designation which distinguishes the break-and-take assortment from the straight candy goods?
A. I am.
Q. Did your company ever make a break-and-take assortment?
A. We did.
Q. When did you stop?
A. We stopped the manufacture as of December 31, 1936.
Q. And under a cease and desist order of the Federal Trade Commission you stopped shipping such break-and-take assortment on the 15th day of January, 1937?
A. That is right.
Q. You sell in intrastate commerce straight lines of candy also?
A. We do.

Q. What volume of business did you do in the state of Illinois during the years of 1935 and 1936, approximately?

A. Approximately $60,000.

Q. In each of the years?

A. The average will be $60,000. I haven't the exact figures.

Q. Do you know what the figure was for 1936?

A. For 1936 it was $60,000.

208 Q. And did you employ salesmen in the state of Illinois?

A. We did.

Q. Those goods which were sold in Illinois were manufactured in your home plant at Fond du Lac and shipped into the state of Illinois?

A. Right.

Q. You maintained correspondence by mail, telegraph and telephone to the state of Illinois in connection with this volume of business that you shipped to Illinois?

A. That is correct.

Q. Since the effective date of the Commission's order to cease and desist in your company's case, what has been the state of the volume of business you have shipped to this state in candies?

A. Down about 80 per cent.

Q. And is it still declining?

A. It is declining because of summer conditions.

Q. But you are expending all efforts to retain your standing in this market, are you?

A. We are doing the best we can.

Q. To what do you ascribe the decline in volume?

A. Due to the fact that we are not able to merchandise break-and-takes, being known as having had them in the past and as break-and-takes are a prime wedge to this business in this market as against straight penny goods, which is all we offer now.

209 Q. By this market, you mean the state of Illinois?

A. That is right.

Q. There are other break-and-takes being sold in the state of Illinois?

A. To my knowledge there are, yes.

Q. I show you Commission's Exhibits 2-A and 2-B, being box cover and legend of the subject involved in this proceeding, the Ta-Ka Flyer assortment.

(Handing document to the witness.)

Q. You know that is being sold in the state of Illinois?

A. I have seen that in jobbers' stocks here in the state.

Q. Along with your 80 per cent decline in volume of

merchandise shipped to the state of Illinois, has there been a decline in the amount of telephone and telegraph expense to this state?

A. There has been a decline of expense, of course.

Mr. Kolinski: That is all.

Examiner Furnas: Cross-examine.

Cross-Examination by Mr. Krein.

Q. In the years prior to the issuance of the cease and desist order against you, Mr. Kuehn, did you push this penny goods in Illinois, or did you concentrate more exclusively on penny break-and-takes?

A. We pushed the penny goods, the straight penny
210 goods in the state of Illinois, but they were sold because we could sell break-and-takes with them. The first question they ask when you call at the jobber's place of business is, "What is new in prizes in break-and-takes?" Naturally, giving you an order on break-and-takes, you were able to sell with it the other items in your penny goods line.

Q. What other items did you handle at that time in the penny goods lines?

A. We have caramels.

Q. In Illinois?

A. In Illinois.

Q. At the time you were selling the break-and-takes?

A. We had caramels, suckers, novelty items.

Q. Do you feel that if you had a new and different type of candy to offer at the present time that you would be able to compete in Illinois even in the face of the break-and-takes?

A. If a new and different type of candy, distinctly different than anything that is on the market, I would answer yes, a novelty piece no one else has yet thought of.

Q. Are you concentrating on sales in Illinois at the present time of your straight penny goods?

A. We discontinued one of our salesmen because of the fact that we lost business. We had to discontinue our resident salesman in the city of Chicago.

Q. Have you any salesman at the present time in
211 the state of Illinois?

A. Not in Chicago. We have outside of the city.

Q. Have you any salesman in Illinois at the present time?

A. One.

Q. Does he handle other lines besides your own?
A. Exclusively our own.
Q. Have you heard of Bunte's Pippins?
A. Yes.
Q. B. B. Bats?
A. Yes.
Q. One cent Baby Ruths, O-Henrys, Butter Fingers, and one-cent Hershey bars?
A. Yes.
Q. Are you acquainted with the fact those items have appeared in rather recent times since the depression?
A. I could not give you the exact date of their appearance on the market.
Q. They are competing at the present time in Illinois with other candies sold, isn't that correct?
A. That may be true.
Q. You have seen them in Illinois, haven't you?
A. Yes.
Q. Competing with break-and-takes?
A. Yes.

212 Q. Do you know how many manufacturers in Illinois manufacture break-and-takes?
A. I am unable to answer that question.
Q. Would you say there is a substantial number?
A. I am unable to give a correct answer as to the number.
Q. Do you know how many manufacturers ship break-and-takes into Illinois?
A. I am unable to answer that question.
Q. Do you know the percentage of one-cent break-and-takes to the penny goods sold in Illinois?
A. Answering that question from the distribution of the Bonita Company I would state as follows, that for 1935 and 1936 in the distribution of our sales, it would run about better than 50 per cent of the actual.
Q. Isn't it a fact that the Bonita Company was known as one of the largest break-and-take houses in the middle west at the time they were selling break-and-takes in interstate commerce?
A. We sold a considerable volume of break-and-takes. Whether we were the leading house, I could not say.
Q. Are you personally opposed to penny break-and-take sales?
A. I am opposed to the restriction of cutting out another manufacturer, confining his business only to one state. It either should be on the basis of stopping the

manufacture entirely or giving all manufacturers the opportunity to ship them in interstate commerce.

213 Q. That is a good answer. I heartily agree.

Assuming all those circumstances, have you any personal opinion, are you personally opposed to break-and-takes if they were allowed to be sold?

A. If every manufacturer were allowed to sell on the same competitive basis we would all be able to make them. I have no personal objection to a break-and-take as a break-and-take except that there is only so much penny goods sold and the sales that are lost on straight penny goods go into the break-and-takes where there is a favorable break-and-take market.

Q. In other words, break-and-takes decrease the volume of such sales to the extent that break-and-takes are sold?

A. That is right.

Q. Do you think if there is a high quality candy put out in the break-and-take line that there is anything to the contention it is unfair or detrimental to the public interest as a whole?

A. There is nothing unfair or detrimental to the public interest, but it is unfair to draw a trade wall against the manufacturer that is outside of the state that cannot compete against every individual break-and-take which may be getting the business within the state.

Q. In the event that a cease and desist order is issued against Bunte Brothers, the respondent, preventing them from shipping in Illinois all break-and-takes, isn't it

214 possible that the respondent, Bunte Brothers, by their sales, by pushing the sales of their straight candy items, their penny items, or by putting out a new and different product, would be able to retain that same volume they lost through the break-and-takes?

A. We haven't found it to be true as yet, dating our experience back to the beginning of this year.

Q. You are speaking of your interstate markets. I am confining mine to Illinois. From your knowledge of the respondent and his advertising methods and the quality of his candy, isn't it possible that in Illinois he would be able to retain those Illinois sales lost by the elimination of the break-and-takes?

A. Speaking from the experience of our own company, I would say no.

Q. Were you eliminated from selling break-and-takes in Wisconsin?

A. We were not eliminated from selling break-and-

takes in Wisconsin, but Wisconsin is not a break-and-take market.

Q. Do you sell break-and-takes in Wisconsin?

A. We have a very limited volume of business in break-and-takes in Wisconsin.

Q. In the event that a cease and desist order is issued against the respondent, it is possible for manufacturers in Illinois, as well as manufacturers outside of Illinois,
215 to secure some possible benefit from the lost sales of interstate shipments of the penny break-and-takes of Bunte's, is it not?

A. That would be possible.

Q. It is also possible Bunte Brothers would be one of those manufacturers that might get some benefit or might get some of the lost volume themselves by shipping a straight penny goods to the jobbers in Illinois?

A. If Bunte Brothers eliminate their break-and-takes, undoubtedly they would be able to retain a part of the straight penny goods business that is now going into break-and-takes.

Q. From your knowledge of the types of candy and the advertising and the merchandising policies of the respondent, do you consider it probable they would be able to retain the entire volume themselves?

A. I doubt it.

Q. At least it is conjectural, a matter of guess in your mind as to what percentage would be to the benefit of interstate and what percentage would be to the benefit of the intrastate manufacturers in Illinois?

A. It is not conjectural. I know from our sales analysis what has happened to our company in the past four months, and what has happened may happen to some other companies, and I think will follow along exactly with the Bunte Company.

Q. The question was, isn't it a matter of guess
216 though as to where the benefits will go? A percentage undoubtedly might go to the interstate and a percentage might go to the intrastate manufacturers if Bunte's were eliminated from selling break-and-takes in Illinois?

A. On a percentage basis, I could not answer that. It is probable it would be split up between a number of manufacturers.

Q. As to the possible benefits any one manufacturer might get, it is conjectural?

A. That is possible, yes. In the case of our company, knowing our situation, it has been disastrous so far.

Q. In your experience that you are referring to here is the stopping of the interstate shipments?

A. Right.

Q. Does your company advertise in Illinois?

A. We advertise to the jobbers, yes.

Q. How?

A. Direct mail.

Q. About how many jobbers do your advertising methods go to?

A. In Illinois?

Q. Yes.

A. I can't answer specifically. We have 4,000 jobbers on our mailing list.

Q. Approximately how many in Illinois?

A. Approximately I would say that there are about 400 jobbers.

217 Q. How often are they contacted through advertisements?

A. On an average of six times a year.

Q. What is the nature of the advertisements?

A. Package goods, bar goods, special season goods such as Easter, Valentine, Christmas.

Q. Penny goods?

A. And penny goods.

Q. Is it more strictly selling methods of advertising methods, these circulars that you send to the jobbers?

A. Repeat that question.

Q. Do you solicit orders when you send these advertising circulars, or are they strictly advertisements?

A. They are both. In some we enclose a return reply postal. In others we do not. We just mention the new items we may have.

Q. What new items has your company had in the past few years?

A. In the past year?

Q. The past year or two in penny goods?

A. In penny goods we have had a Whopper Sucker.

Q. Any others?

A. We have a caramel piece we call 120 Count Tough Guys.

Q. Are those new items?

A. No, they were put out, one was put out early in 1935, the Whopper Suckers, and the Tough Guys
218 were started in November of 1936.

Q. Are those the penny goods that you have just mentioned?

A. We have 240 count goods and 120 count goods. I

haven't my price list. We have any number of them. I am speaking of the items that you asked about.

Q. The two items that are relatively new are the Whopper Sucker—

A. Right.

Q. How does that item compare in quantity with the suckers put out by the Crystal Pure Company?

A. The Whopper is a large molasses chocolate dipped sucker. I don't think the Crystal Pure is a chocolate dipped piece. It is a regular bar.

Q. Are you selling Whopper Suckers in large quantities in Illinois?

A. No, not now.

Q. What new item have you been able to sell in Illinois?

A. Frankly, we have not sold anything new in Illinois.

Q. Have you tried to?

A. We have tried to.

Q. Through your advertising circulars?

A. Advertising in direct mail.

Mr. Krein: I think that is all.

Examiner Furnas: Anything further?

Redirect Examination by Mr. Kolinski.

219 Q. Has there been a decline in the amount of money you spent for advertising in the state of Illinois since January 15th of this year?

A. It has been the same for the reason when you circularize our jobbers we don't draw out a certain state for the advertising, we advertise the product in every state.

Q. Did the previous business that you did in Illinois call for any special advertising on your assortments?

A. We did while we were making break-and-takes of course send out advertising on the break-and-takes. At the present time we, of course, would not send out any advertising on that class of merchandise.

Q. To the state of Illinois?

A. No.

Q. Have you any idea what that might amount to?

A. Oh, probably $150, something like that.

By Examiner Furnas:

Q. How much?

A. About $150.

By Mr. Kolinski:

Q. For how long a period?

A. For the year. We have a certain budget.
Q. There has been that decline from the state of Illinois?
A. Yes.
220 Q. It has been testified that the respondent sold in 1936 86,000 units of the Ta-Ka Flyer assortment. If the respondent were to cease making and selling the assortments in the state of Illinois, is it your opinion that for the recoupment in straight goods of the $86,000 of business represented by these 86,000 units that other straight goods manufacturers in Illinois and manufacturers located outside of the state would be placed on an equal competitive basis to recover it?
A. Yes.
Mr. Kolinski: That is all.

Recross Examination by Mr. Krein.

Q. Although the opportunity would be there, Mr. Kuehn, it is conjectural what benefits would be derived by interstate manufacturers and also conjectural what benefits would be derived by intrastate manufacturers, relative percentages I am speaking of?
A. That is correct.
Mr. Krein: That is all.
Mr. Kolinski: That is all.
Examiner Furnas: You may be excused.
(Witness excused.
Examiner Furnas: Are you ready to proceed?
Mr. Kolinski: I will call Mr. L. J. Fink as a wit-
221 ness.

L. J. FINK, was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Kolinski.

Q. Will you state your name?
A. L. J. Fink.
Q. Where do you reside?
A. 4145 North Broadway, Chicago.
Q. What business are you in?
A. Candy broker.
Q. How long have you been in the business?
A. Oh, over ten years.

Q. What companies have you been with during that time?

A. Well, I was with the Sweets Company, that is Tootsie Rolls, and Just-Born for a little while. At the present time I am with the American Mint Corporation out of New York, and Thomas M. Davis, fudge, in Philadelphia. I had a lot of lines of short duration that didn't mean anything.

Q. You have had Walter's Marmalade?

A. That is just a seasonal item, a couple of months in the spring.

Q. That is where?

A. New York.

222 Q. And the American Mint?

A. New York.

Q. And chocolate popcorn?

A. That is a Christmas item. That is good for a month or two. I don't call that a regular line.

Q. Approximately what is the volume of business you sell in this state for the outside concerns you represent in a year?

A. Oh, offhand I have never kept a record on it.

Q. Just give us a figure in excess of a certain amount.

A. I could not. I don't know. I will say over $10,000 if you want to put that down.

Q. In other words, these companies which you represent which are located in the states of Pennsylvania and New York, you take the orders in the state of Illinois for the goods, which orders are transmitted to the plants in Pennsylvania and New York—

A. Whichever it might be.

Q. (Continuing.) —and the goods are shipped here in an amount of at least $10,000 a year?

A. Yes, at least.

Q. What class of trade do you sell to?

A. I sell to the wholesale candy jobber. I have a few department stores, and I sell to a few institutions like the Woman's Reformatory out at Dwight, a few places like that.

223 Q. About how many jobbers do you sell to?

A. Oh, I would say in excess of 100. If I knew what you wanted, I could probably dig into it.

Q. Your experience in the candy business, has it been such that you learned a little about the retail selling methods in the candy field?

A. I had a lot of experience. I had twenty-one men right here in this city doing nothing else but retail work under my jurisdiction.

Q. When was that?

A. Oh, six years ago, seven years ago. In fact, I covered from Maine to California with the Tootsie Rolls.

Q. You are familiar with a mode of selling in the penny goods field known as the penny-break-and-take assortment?

A. Yes.

Q. You are familiar with the trade designation "break-and-take" as being distinguished from straight goods in the field?

A. Yes.

Q. Do you see penny break-and-take assortments in the state of Illinois?

A. Occasionally.

Q. I will show you Commission's Exhibits 2-A and 2-B, Exhibit A being the box cover of a container for the assortment known as the Ta-Ka Flyer assortment.

224 (Handing documents to witness.)

Q. You will note on the legend that the 160 units contain twenty pieces with orange centers, that the purchaser who procures one cream with an orange center wins an assorted bar, one of twenty bars that are packed in the assortment, and the last purchaser of the 160 creams procures a half a pound box of candy. You have seen that assortment in the state of Illinois?

A. Yes, I have.

Q. From your experience in selling candy in the state of Illinois, have you an opinion as to what effect the total volume of break-and-takes sold in the state of Illinois has on the total volume of straight goods in the candy industry sold in Illinois?

A. Well, it is my opinion that it would take away sales from the regular lines, especially when they have an attractive break-and-take.

Q. Is it your opinion the volume that is sold in break-and-takes detracts by that much from the total volume of straight goods that are to be sold?

A. I won't say the exact total volume, I don't know what the percentage might be; it may be more or less, but it does take away a volume of the penny sales on regular staple items.

Q. Is there any demand in the state of Illinois for

225 break-and-take items?

A. There is.

Q. Have you been asked for them?

A. I have.

Q. Do you find that your failure to carry a break-and-take assortment affects the amount of straight goods business you are able to sell?

A. Well, I won't say it affects the amount of straight goods I sell. I suppose if I had a good break-and-take, I would be selling the same amount, but I would sell the break-and-take too. In dollars and cents it would mean more to me.

Q. How frequently do you meet a demand for break-and-takes from brokers?

A. Well, I would say some jobbers don't carry it, especially where it is prohibited in town, but I could say that you are asked 75 per cent of the calls anyhow.

Examiner Furnas: Do I understand it is prohibited in some towns?

The Witness: Yes. You take up here only yesterday, this town up at, not Chicago Heights, up at Harvey, Illinois, there is one jobber in the town and the chief of police came in sometime ago and asked him not to sell any more. I don't know, some organization of women or some protest was made against it. He kept selling what he had in stock and did not buy any more. He wanted to dispose of
226 his stock, to turn it into money. The chief of police came down and told him to quit and to send back whatever he had and to discontinue selling prizes.

By Mr. Kolinski:

Q. Have you a personal opinion on the question of selling break-and-takes?

A. Well, my personal opinion is this, selling break-and-takes, the kids would probably spend a few cents more in chances to get something more than they would on a regular penny item.

Mr. Kolinski: You may cross-examine.

Mr. Krein: No cross-examination.

(Witness excused.)

Mr. Kolinski: At this time I will ask for an adjournment until 12:30 Central Standard Time today.

Examiner Furnas: Let the record show that the hearing is adjourned to reconvene at 12:30 p. m., Central Standard Time.

(Whereupon, at 11:30 a. m., CST, a recess was taken until 12:30 p. m., CST, of the same day, May 5, 1937.)

Afternoon Session.

12:30 p. m. CST.

Examiner Furnas: Let the record show this hearing was reconvened at 12:25 p. m. Central Standard Time. Are
227 you ready to proceed?

Mr. Kolinski: Yes. I would like to ask that the witness be sworn.

HENRY KELLER, was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Kolinski.

Q. Your name is Henry Keller?
A. That is correct.
Q. And you are here under subpoena?
A. Yes.
Q. Where do you reside?
A. 900 Rush Street.
Q. Chicago?
A. Chicago, Illinois.
Q. What business are you in?
A. I am in the confectionery business.
Q. How long have you been in that business?
A. Seven years.
Q. During that time what companies have you represented?
A. Well, the Goudy Gum Company during all that time.
Q. Where are they located?
A. Allston, Massachusetts.
Q. What others?
228 A. I also represent the Fair Play Caramels of Johnson City, New York.
Q. Have you represented any other companies during that period of time?
A. Yes, I have, but not during the last two and one-half years.
Q. What companies were they?
A. One was the Edgar Lewis Company, Austin.
Q. Any others?
A. I think I did have another line or two, small ones, I do not have them now.
Q. Your capacity in the industry has been that of a manufacturer's representative or broker?

A. Broker, that is correct.
Q. What class of trade do you call on?
A. Jobbing only.
Q. In what territory?
A. My territory at the present time is metropolitan Chicago, Waukegan, Racine, Milwaukee and Kenosha.
Q. Are you in a position to state what volume of business you sold for the Goudy Gum Company of Massachusetts and the Fair Play Company of New York in the state of Illinois alone?
A. You mean in the immediate metropolitan district?
Q. Yes.
A. On Fair Play I know last year I ran around
229 $45,000 or $44,000, something like that. That was the year before. It ran around $35,000 this last year.
Q. And Goudy?
A. I would have to guess at that.
Q. Just give us a close approximation.
A. Oh, I would imagine between $60,000 and $70,000.
Q. In 1936?
A. Yes.
Q. That covers the sales value of goods for which you took orders in the metropolitan area of Illinois?
A. That is correct.
Q. And you transmitted the orders to the home office in Massachusetts and New York and the orders were thereupon filled and the merchandise shipped from the place of manufacture in Massachusetts and in New York to your customers in Chicago, Illinois?
A. That is correct.
Q. What line of goods do these companies manufacture?
A. The gum company manufactures all kinds of penny gums. The caramel company manufactures the penny caramels and suckers, all penny merchandise.
Q. What class of trade do you call on?
A. The jobbing trade.
Q. About how many jobbers do you call on?
A. Oh, I imagine here in the city it would be around
230 seventy-five.
Q. Do you call on any other jobbers outside of the city of Chicago in Illinois?
A. That includes Joliet, Aurora, Elgin, Gary and Hammond, which is metropolitan Chicago.
Q. In your experience in the candy industry, have you become acquainted with the methods of distribution by retail sellers?
A. Well, I have to a certain extent, yes.

Q. Are you familiar with a form of preparing penny goods for sale in a combination known as break-and-take assortment?

A. Yes.

Q. I show you a box cover and legend from a box called Ta-Ka Flyer assortment, being exhibits in this case, Commission's Exhibits 2-A and 2-B; are you familiar with that assortment?

(Handing documents to witness.)

A. Yes.

Q. Have you seen that assortment in the state of Illinois?

A. Yes.

Q. You have seen it among your customers?

A. Yes.

Q. How frequently?

A. Oh, quite frequently.

Q. Do most of your jobbers have this assortment in stock?

231 A. I would say a good portion of them have it, yes.

Q. You are familiar with the principle under which it operates, twenty creams of the 160 are orange-centered and the purchaser who procures the orange cream thereby wins one of the assorted twenty bars?

A. That is correct.

Q. The last purchaser wins the half pound box of chocolates?

A. Yes.

Q. Do you carry a break-and-take assortment?

A. No, I am not carrying any now.

Q. Are you personally opposed to the sale of break-and-take assortments?

A. Yes, I am.

Q. What are your reasons?

A. Well, I figure it takes away from the regular penny sales plus the fact I don't think the youngsters are getting a penny's worth of candy, or whatever the item might be.

Q. And is there any other reason, as far as the youngsters are concerned?

A. Well, it is a little unfair, I imagine.

Q. From your experience in selling candies in the state of Illinois, have you an opinion as to the effect the volume of break and takes sold in Illinois has upon the volume of straight goods sold in Illinois?

A. What effect it has on the selling of straight goods?

232 Q. Yes.

A. Gee, that would be a hard thing to answer.

Q. Does it add or detract from the volume of straight goods that is sold?

A. My candid opinion would be it would detract from it.

Q. From your experience in selling candies in the state of Illinois, did you find your failure to carry the break-and-take assortment has affected the amount of straight business you have been able to sell in Illinois?

A. Well, that would be hard to answer.

Q. You don't cover any of the rural territory in Illinois?

A. No.

Q. Have you had jobbers in the metropolitan area ask for a break-and-take assortment?

A. No, I have not.

Q. Sir?

A. No, I have not recently, at least.

Q. Do you think your own volume of straight goods sold in the metropolitan area would be greater if there was no break-and-take assortment sold in the metropolitan area?

Mr. Krein: I object. The witness has already answered that by saying he hasn't any opinion.

Examiner Furnas: I will let him answer if he wants to answer it. Objection overruled.

Mr. Krein: Exception.

233 Mr. Kolinski: Read the question.

(The question referred to was read by the reporter.)

The Witness: I think it would.

By Mr. Kolinski:

Q. It is in this metropolitan area you have frequently seen the Ta-Ka Flyer bar assortment evidenced here by Commission's Exhibits 2-A and 2-B?

A. Yes.

Mr. Kolinski: That is all.

Examiner Furnas: Cross-examine.

Cross-Examination by Mr. Krein.

Q. It is a mere matter of guesswork or conjecture, is it not, the extent of the benefit that could be derived if the respondent, Bunte Brothers, ceased selling break-and-takes in Illinois?

A. Yes.

Q. The extent of the benefit then to your company is a mere matter of guesswork, conjecture?

A. Absolutely.

Mr. Krein: That is all.

Redirect Examination by Mr. Kolinski.

Q. The respondent in this case sold in the state of Illinois in the year 1936 86,000 units of the Ta-Ka Flyer
234 assortment. If the respondent were to cease making and selling these assortments in the state of Illinois, is it your opinion that other manufacturers in the state of Illinois as well as manufacturers located outside of the state of Illinois would be put on an equal basis of competition in procuring the business that would be made available by ceasing the making of these break-and-takes?

A. Well, they would be providing others quit making break-and-takes also. If this is the only concern, why, undoubtedly other concerns would pick up the business.

Q. You mean other concerns—

A. That are making break-and-takes would take up that business.

Q. If the respondent ceased making them he would be in the same position you are in today?

A. Yes.

Q. Handicapped by these break-and-takes?

A. That is correct.

Q. If all manufacturers ceased you figure the remaining manufacturers in the state of Illinois, as well as the manufacturers located outside of the state, would be put on an equal basis of competition in recouping the business?

A. I think so.

Mr. Kolinski: That is all.

Recross Examination.

235 By Mr. Krein:

Q. When did you stop selling break-and-takes?

A. With my Fair Play Caramel Company I never had one. We had some gum break-and-takes seferal years ago. I haven't sold any of those going on three years or more, four years.

Q. Have you ever heard of Bunte's Pippins?

A. Yes.

Q. One-cent Baby-Ruths?

A. Yes.

Q. O-Henry, Butter Fingers and Hershey bars?

A. Yes.

Q. Are you acquainted with the fact those products put out in those sizes have arisen since the depression, in rather recent years?

A. Yes.
Q. They are now in Illinois?
A. Yes.
Q. And sold in substantial quantities?
A. I imagine they are.
Q. Competing with break-and-takes?
A. You can say competing, yes.
Q. Isn't it a fact if a company puts out a product that purchasers want and ask for, that they will be able to sell that product in Illinois in competition with break-and-takes?

A. Yes, they will, sure.
236 Q. Isn't that an example of the B. B. Bats?
A. Yes.
Q. That is a good quality, good quantity candy that is competing in Illinois at the present time, is it not?
A. Yes.
Q. Do you know how many manufacturers in Illinois manufacture break-and-takes?
A. No, I don't know offhand.
Q. Have you an opinion it is a substantial number?
A. Well, I think it is a fair number, plus the fact some of the concerns are doing a big volume of business in them.
Q. Do you know how many manufacturers outside of the state of Illinois ship break-and-takes into Illinois?
A. No, I don't.
Q. Would you say it is a substantial number?
A. I can't say offhand. I know some of them, but I would not say it is a good number.
Q. In the event that the Commission issues a cease and desist order prohibiting the respondent, Bunte Brothers, from manufacturing or selling break-and-takes in Illinois, it is possible, is it not, that Bunte Brothers themselves will be able to retain that same volume by pushing their straight penny goods or by putting out a new and different piece like Pippins, B. B. Bats, some new and different item?

A. That would depend on whether other concerns
237 are through with break-and-takes also. I still feel if other concerns are manufacturing break-and-takes they will pick up a lot of that business that is brought to you by this assortment.
Q. You say even assuming other concerns keep manufacturing break-and-takes you feel the respondent will be able to pick up a considerable amount of business by these sales of its straight penny candy?
A. Providing these others cease.

Q. My question is assuming they do not desist.

A. No; I feel the other concerns will pick up a lot of that volume.

Q. Your opinion is not all the volume that Bunte is now doing in the break-and-takes, will be eaten up by the other break-and-take manufacturers?

A. I would say most of it would, yes.

Q. When would you say the B. B. Bats reached their top volume in Illinois?

A. Oh, about two or three years ago.

Q. And in competition with the break-and-takes?

A. Yes.

Q. Because it was a new item?

A. Merely because it was the biggest penny sucker on the market.

Q. Don't you think the respondent will be able to recapture some of the business then and not have it go
238 to the other manufacturers of break-and-takes?

A. Depending on what he puts out.

Q. It is possible by pushing or advertising straight penny goods or by putting out a new and different item to recapture some of that lost volume?

A. All depending on what he puts out.

Q. Assuming the cease and desist order is issued, you feel then that the break-and-takes now being sold in Illinois will procure most of the business that Bunte now is getting in his sale of break-and-takes?

A. Yes, I *do*.

Q. In that event no interstate manufacturers of candy or intrastate manufacture of candy will be benefited by the cease and desist order of the respondent, against the respondent?

A. I did not get that question.

Mr. Krein: Read the question.

(The question referred to was read by the reporter.)

A. I would say no.

By Mr. Krein:

Q. Because it would all—

A. That is assuming now the others are continuing the break-and-takes.

Mr. Krein: That is all.

Mr. Kolinski: That is all.

239 Examiner Furnas: You may be excused.

(Witness excused.)

Mr. Kolinski: I have a couple more questions to ask Mr. Bunte.

Examiner Furnas: All right. Let the record show Mr. Bunte is recalled.

FERDINAND A. BUNTE, resumed the stand and testified further as follows:

Redirect Examination by Mr. Kolinski.

Q. Mr. Bunte, the 86,000 units of Ta-Ka Flyer which were manufactured and sold in the state of Illinois by your company last year constitutes the only break-and-take assortment which your company manufactured and sold in Illinois during the year 1936?

A. Yes, all I know of now.

Q. That is the only one that you are manufacturing and selling in the state of Illinois at this time?

A. Yes.

Q. In the packing of candies you use what is known as a count system in pricing?

A. No.

Q. Do you have the 24-count?

A. Five-cent bars, yes.

Q. That is the only 24-count?

240 A. Five cent bars.

Q. That sells at about 80 cents?

A. No, 60 cents and 64 cents, and it varies according to the value.

Q. That is less 2 per cent discount?

A. Yes.

Q. The 120-count?

A. That varies according to value.

Q. What are the variations?

A. From 76 cents to 57½ cents.

Examiner Furnas: When you speak of the count, do you mean, for instance, the 120 count there are 120 pieces in the—

The Witness: Container.

Examiner Furnas: I see.

By Mr. Kolinski:

Q. What is the highest count that you sell?

A. A barrel of jelly beans containing probably a million.

Q. That isn't known as a count in the trade?

A. You can scratch that, I believe.

Q. The 120 count is the highest?

A. 240.

Q. That sells at what range?

A. That would be a two for a cent item.

Q. The 240-count would sell between a range of 65
241 cents and 80 cents?

A. No; it all depends on what the quality is, what the item is.

Q. What range would that carry?

A. From 57½ cents to 65 cents. I am speaking of wholesale prices only.

Q. Yes, in reference to the wholesaler. The Ta-Ka Flyer assortment, what count would that more nearly resemble?

A. It resembles no count.

Q. It is a specially prepared assortment?

A. Right.

Q. How much does the box of 160 creams weigh?

A. I have no idea.

Q. Does it weigh a pound?

A. I have no idea. I can't tell weights by lifting them.

Q. By lifting them?

A. No.

Q. In the 24-count bar assortment the retail unit is five cents per bar?

A. Not always, no.

Q. What is it?

A. It could be ten cents. Twenty-four is two dozen. That could be packed one dozen and it could be packed three dozen. We have packed as high as four or five dozen in a container of five cent bars.

242 Q. If there are five dozen does the price vary?

A. No. It might with free goods added.

Q. Take a 24-count bar, a nickel bar, that would sell at from 60 to 65 cents, wouldn't it?

A. Yes.

Q. If you pack five dozen it would cost around $3.00, wouldn't it?

A. It all depends on what your container cost is.

Q. It would cost more than 60 cents and 65 cents?

A. We pack our merchandise to sell according to our own cost figures, as to the value we can give the wholesaler, regardless of what anybody else packs their merchandise for. We don't follow anybody. We are an individual house.

Q. What is the net price at which the Ta-Ka Flyer bar assortment is sold wholesale?

A. Eighty-five cents.

Q. Eighty-five cents net?

A. Off the record.

Examiner Furnas: On the record.

By Mr. Kolinski:

Q. At what price would your 20-bar prizes in this assortment be sold at on the basis we have been discussing?

A. We don't pack those bars except for this Ta-Ka Flyer assortment. We manufacture them especially for this assortment.

243 Q. They are not five cent bars?

A. We have never said they were.

Q. Are they worth half as much as five cents?

A. I have stated in the record before the value is between three cents and five cents.

Q. If the five-cent bar pack, 24-count container, brought 65 cents the 20-bar prizes here would probably bring 30 cents?

A. I have no idea. We have never packed them that way or figured them that way.

Q. I realize that. If you did, what would they bring? I am asking you for the relative value.

A. I have no idea.

Q. You do know what the retail value of the twenty bar prizes is, don't you?

A. No, I don't. It varies.

Q. Are you in position to look at the twenty bar prizes here and tell us what their retail value is?

A. I said between three cents and five cents.

Q. That would make it between 60 cents and a dollar, would it not, for twenty pieces?

A. According to those figures, yes.

Q. What is the retail value of the half pound box of candy?

A. In excess of 25 cents.

Q. The pricing on the 24-bar count items if sold 244 at 60 cents to 65 cents is about half of what they would bring to the retailer, isn't that right?

A. The jobber tries to get 80 cents from the retailer and the retailer at five cents straight would take in $1.20.

Q. On a unit?

A. Of 24 five-cent bars.

Q. That unit would leave your plant at from 60 cents to 65 cents?

A. Whatever our selling price would be on that particular item that you are talking about.

Q. On that basis the retail value of the Ta-Ka Flyer assortment would be, taking your minimum figure of three cents on the bars, 60 cents, plus 25 cents, or 85 cents, plus $1.60 making $2.45?

A. You can't break down a package of this kind.

Q. Will you answer that question? Is my arithmetic right?

A. Yes, I will answer it. It is packed through modern facilities. It cannot be compared with any other manufacturer's attempts to copy this item or any other item. It is packed by our own process, our own machinery, to bring this item to sell for 85 cents. It constitutes a unit and cannot be broken down as it is priced as a compact assortment. We are trying and attempting to give the public all we can for the money.

Q. The small container which contains the 160
245 creams you take the position has a retail value of $1.60?

A. Those creams would be sold in bulk two ounces for five cents in package form.

Q. Do you know what they weigh?

A. No, I don't.

Q. Would that bring them to a penny apiece?

A. Yes, it would.

Q. They are about the thickness of three nickels, are they not?

A. More than that.

Q. More than that?

A. Three what?

Q. Five-cent pieces.

A. You would have to measure that.

Q. Some are and some are not. On the basis of the apparent retail value of these items there is apparently $2.45 of retail value of merchandise in this assortment?

A. We don't claim it.

Q. On the figures you have given?

A. No, that is not on the figures I have given.

Q. What would you say the correct figure is?

A. We don't know. We sell that for 85 cents. The jobber is supposed to sell it for $1.10 and the retailer sells it for $1.60. So the public pays $1.60 for it.

Q. As a matter of fact, are not the 160 units worth
246 less than one cent each at retail?

A. No, they are not, according to the prices of high grade quality chocolate pepperments.

Q. And the apparent discrepancy between the total of retail figures that you have given for the detailed items here, representing a total of $2.45, the discrepancy between the $2.45 and the $1.60, which the retailer eventually gets for this package, is something that is a benefit accruing to the public as a result of your efficient methods, is that it?

A. I will answer that in this way. Anybody that pays $1.60 for that package, they will have received $1.60 worth of quality candy.

Q. You feel further they receive $2.45 worth of candy, don't you?

A. I don't know anything about any $2.45 price. The consumer pays $1.60 for that assortment.

Q. You take the position the $1.60, which covers the retail value of the 160 creams, would leave all of the other prizes, including the last prize, as a gratuity, as a premium?

A. We have made the package to sell to the wholesale trade for 85 cents. What the wholesaler does with our merchandise after it reaches his place of business we know nothing about it.

Q. You know, though, that this is sold to bring the retailer $1.60?

247 A. According to the price on the box and according to our figures, we have built up for that.

Q. You know in fact that it does?

A. If they sell them for a cent, yes, it does.

Q. Do you know whether the creams comprising the 160 count are being sold for less than a cent apiece?

A. I have no idea. I am not acquainted with the retail distribution method.

Q. You keep in touch with the retailers?

A. No, I don't personally.

Q. But over and above the 160 creams, what position do you take as to the twenty prizes and the box, is that a gratuity to the public?

A. This is made to sell to the wholesale trade for 85 cents and that is all I know. That is all I am interested in.

Q. Well, you are interested in your figures. You are interested in the product being a success?

A. That is right.

Q. There are some reasons for your placing in this container certain values?

A. The success of that product is the high quality used, and if it might be said in comparison or in competition with like assortments.

Q. You don't think the success all lies in the fact that the individual purchaser of one of the 160 creams gets

248 much less than a penny's value which is offset or balanced by the greater value of the twenty prizes?

A. I have stated in the record twice it is a penny value of chocolate cream.

Q. Do you take the position at this time the small container holding the 160 creams is worth as a matter of cost to you people more than the twenty prizes, including the small box of chocolates?

A. I haven't the cost figures with me.

Q. We are assuming you know your business to some extent. What is your opinion on that?

A. It is a matter of workmanship. It is a matter of one person's mind against another. Personally, it is nothing more than an assortment of fine candies. I might say at this time if you try to break down into cost, you are not taking into consideration that candy is sold to the public from ten cents a pound to $2.00 a pound, and that you are attempting to classify all candies in the same status regardless of quality.

Q. Is there some $2.00 a pound candy in this assortment?

A. No, there is not.

Q. What is the value per pound of the creams in the 160 count?

A. They are not sold by the pound in that shape.

Q. How are they sold?

249 A. They are sold by the count as a part of that assortment.

Mr. Kolinski: I have no further questions.

Examiner Furnas: Cross-examine.

Recross Examination by Mr. Krein.

Q. You said the bars were manufactured especially for this assortment. You meant packed especially? They are from your regular stock of merchandise?

A. Some are packed especially and some are manufactured especially.

Q. Those manufactured specially are the same high quality candy?

A. The same high quality candy that we manufacture.

Mr. Krein: That is in the record before, I suppose. That is all.

Redirect Examination by Mr. Kolinski.

Q. But the box of 160 creams sold to the wholesaler at 85 cents conforms to the usual basis of return of about two for one?

A. The box of 160 creams that you are speaking of are not sold outside of this assortment. You stated in

that question it is sold to the wholesaler for 85 cents.

It is not sold for 85 cents or at any other time with-
250 out the accompanying bars.

Q. If you were to attempt to sell to the jobbing trade this box of 160 creams, what price would you ask them?

A. We don't sell that box to the jobbing trade.

Q. I am asking your opinion as a manufacturing man who knows about it.

A. We are talking about this assortment, the way it is. We have never contemplated selling that box of creams to the wholesale trade. When we do, why I will be glad to answer that question.

Q. Have you any opinion now at what price you could sell that box of 160 creams to the jobbing trade for resale to the public?

A. I have not.

Mr. Kolinski: That is all.

Examiner Furnas: You may be excused.

(Witness excused.)

Examiner Furnas: Have you another witness?

Mr. Kolinski: Yes, Mr. Mellen.

HENRY J. MELLEN was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Kolinski.

Q. What is your name?

251 A. Henry J. Mellen.

Q. Where do you live?

A. 5320 Cornell Avenue.

Q. Chicago, Illinois?

A. Yes.

Q. What business are you in?

A. You can call me a candy broker. I represent three or four lines.

Q. What lines do you represent?

A. The National Licorice Company.

Q. Where?

A. Brooklyn.

Q. Brooklyn?

A. The parent factory is in Brooklyn. They have a factory in Philadelphia, in Moline and in Montreal. Brooklyn is the parent factory.

Q. What other companies?
A. The American Candy Company, Milwaukee.
Q. What others?
A. C. S. Allen Corporation, Brooklyn.
Q. Any others?
A. And the Terry Candy Company. Until the first of May they were in Orange, New Jersey. Now they are in Elizabeth, New Jersey. They moved there in the last two days.
Q. What territory do you cover?
252 A. Just Chicago and the immediate suburbs.
Q. Located in the state of Illinois?
A. Oh, yes.
Q. Can you tell us approximately what volume of these companies' products you sell in the state of Illinois only?
A. Well, it would not be fair, I could not give you that, because it has been so variable. I represented, for example, I have figures, I will take as little time as possible, but I have represented the American Candy Company for forty-seven years and I have had big years and little years. Right now the volume is small for them. There is a good business reason for that.
Q. About what volume of goods do you sell for the New Jersey, New York and Wisconsin organizations?
A. Altogether, you mean?
Q. The annual volume, approximately.
A. In dollars and cents?
Q. In dollars and cents.
A. I sold within a few dollars of $60,000 last year?
Q. That represented goods shipped into the state in reply to your orders from the places of manufacture in New Jersey and New York?
A. From these various sources.
Q. Wisconsin, New York and New Jersey?
A. Yes.
253 Q. And sent to your customers in Illinois?
A. Yes.
Q. How long have you been in that business?
A. I have been selling goods for forty-seven years as a broker.
Q. What class of trade do you call on?
A. Jobbers and big retailers and chain stores, the jobbers, of course, comprising tobacco and drugs.
Q. About how many jobbers do you call on?
A. I have between 80 and ninety accounts here altogether. That includes all my customers. That includes

the chain stores and the big retailers, like the Fair and Balaban & Katz. That is all my customers, between eighty and ninety.

Q. From your experience as a candy broker you have had,—some experience in contacting retail stores?

A. Not small retail stores.

Q. The larger ones?

A. Only such as the Fair, Marshall Field and the loop retailers, and Wieboldt's.

Q. Do you know about the manufacture and the selling of penny merchandise known as the break-and-take assortments?

A. Oh, yes.

Q. You know the trade designation of break-and-take assortments as distinguished from straight goods?

A. From straight goods, absolutely.

254 Q. As used in the trade? I show you Commission's Exhibits 2-A and 2-B, this being a box cover—

A. Yes, Bunte Brothers.

Q. (Continuing.) —and a legend accompanying the assortment in this case called the Ta-Ka Flyer assortment. (Handing document to witness.) You are aware of the 160 unit creams packed, twenty of which are orange-centered creams?

A. Yes.

Q. And the purchaser of an orange cream is thereby entitled to one of the twenty assorted bars, and the last purchaser of the 160 creams procures the half pound box of chocolates?

A. Yes.

Q. You have seen such assortment in this city?

A. Oh, yes.

Q. You have seen this particular one?

A. I did not examine this. I know Bunte had this out. I did not examine any one of these boxes. Of course I know what they are. I know the ethics, the spirit of them.

Q. Do you carry a break-and-take assortment of your own?

A. No.

Q. Do some of the jobbers carry them that you call on?

A. I am pretty sure they do, oh, yes, they do, but I don't sell any.

Q. Have you been asked to sell a break-and-take assortment by any of the jobbers?

255 A. Yes, I have, but not often, because it is a known fact among the jobbers I don't sell any prize draws any more, any pick-and-take.

Q. Are you opposed to the break-and-take assortments?

A. Personally, I don't thing it makes any difference to me, but I am really opposed to it.

Q. What are your reasons?

A. Well, there is no doubt in my mind but what it injures the legitimate straight penny goods business. There is no doubt in my mind.

Q. Have you any reason also concerning the welfare of children customers?

A. Oh, absolutely. That to me is the main reason. I think it is to conductive to cultivating a gambling spirit in young minors.

Q. From your years of experience in the candy industry in the state of Illinois, have you formed an opinion as to what effect the volume of break-and-takes sold in this state has on the gross total volume of straight goods sold in the state?

A. Do I interpret your question to ask how much it damages the regular business?

Q. Has it any effect on the regular business?

A. Well, I can only answer that I only perceive that it must affect it.

256 Q. In what way?

A. It certainly takes away money from the regular—if the children have a penny to spend they will take a chance with it. They are attracted. They are attracted to a thing like that. I sold thousands of boxes of them in 1922, 1923 and 1924 myself, thousands of boxes, tens of thousands of boxes.

Q. Your conclusion is from your experience in the candy industry in the state of Illinois?

A. Of course.

Q. Break-and-takes sold in the state of Illinois, when they are sold they take so much from the straight goods volume?

A. I don't know it takes away that entire volume because I think kids will spend more money on them than straight goods, but it undoubtedly takes away a big percentage from the 120-count goods where you get one penny's worth. There is no doubt in my mind.

Q. From your experience in the candy industry in this state have you found the failure to carry the break-and-take assortment has affected the amount of straight business you have been able to sell in Illinois?

A. I cannot say definitely that it has, because I am not strong in penny candies to sell myself. My house is not, the American Candy Company, is not strong in penny merchandise. It would not affect the Licorice Company because there is no such thing as a licorice break-and-
257 take. The National Licorice has never gotten into— perhaps I am talking too much, but I want to be exact in my answers. I don't think it has affected me, because I haven't a number in penny candies myself, my house does not furnish them for me to sell. No doubt it would undoubtedly hurt those who did have them. I think there is no doubt about that.

Q. Any effect you have noticed would be from the reduction of the volume or the amount of money available for straight purchases that the break-and-take assortments take from the consumer?

A. Most obviously.

Q. You feel you would get your fair share of that if the sale of break-and-takes were discontinued?

A. Yes.

Mr. Kolinski: That is all.

Examiner Furnas: Cross-examine.

Cross-Examination by Mr. Krein.

Q. The candy that you take orders for in Illinois for the National Licorice Company, is that candy sent from New York or sent from Moline?

A. We fill lots of Chicago orders from Moline. We make one specialty in the Brooklyn factory which cannot be made in any of the other factories. We ship that from Brooklyn.

Q. Of the $60,000 volume you did in 1936 from all
258 these companies, what percentage came from Moline?

A. Approximately 66⅔ per cent. They shipped $40,000.

Q. Only about $20,000 of the volume came from outside the state?

A. My business for them is small and I might add that neither the Terry concern in Brooklyn nor the American Mint concern has any penny goods to sell. I did sell some penny goods for Brooklyn. If the fact is interesting to you, my business is for the National Licorice Company and it will be a fair figure this year.

Q. Of the $20,000 worth of business done in Illinois, what portion consisted of penny goods?

A. Very small. I could not give an intelligent answer,

because in that $20,000 were pound goods to sell. I have sold English toffee and pound goods in after-dinner mints and cream mint patties. You have seen them. There are a few penny goods. An estimate would be unintelligent and unintelligible. I could not give that. It would be very small.

Q. Do you sell bars in Illinois?

A. I sell very few bars.

Q. In the event the Commission issues a cease and desist order preventing Bunte from making penny break-and-takes in Illinois, any benefit that might be derived by your company would be very small, is that correct?

A. It would be small.

259 Q. By reason of the fact—

A. By reason of the fact of not having a varied line of salable penny goods.

Q. You feel there would be an opportunity for manufacturers to secure some of the volume that previously went to the Bunte break-and-takes in the event Bunte stopped making them.

A. If all penny goods were of the one general type of penny goods, obviously, it would make considerable difference to them.

Q. Isn't it possible the volume of business taken away by the discontinuance of the penny goods sales would be recaptured by the respondent by their other straight penny goods or by pushing a new and different item?

A. To a certain extent, but not fully, because my opinion is this thing coaxed the pennies out of the kids' pockets more than anything else. I think it does. I may be wrong.

Q. Of the volume that would be obtainable to penny goods manufacturers, do you think that Bunte Brothers themselves would secure—

A. With more penny goods?

Q. To make up for the last volume.

A. That I could not answer intelligently, because I don't know.

Q. At least, of the lost volume, Bunte would have

260 an opportunity with other manufacturers to regain that lost volume, would they not?

A. In my opinion, absolutely.

Q. From your experience in the candy industry and your knowledge of the respondent and its products, its merchandising and advertising facilities, do you think that it is probable that Bunte would be able to make up the lost volume through its sales of straight penny goods, a considerable amount of its lost volume?

A. I doubt if they would make it all up. I have no doubt that it has largely increased their sales of their business in penny items. I can say this, we will call it a penny item because that is what it is, it is a penny investment, I firmly believe the children spend more money on that than they would spend on straight penny goods, because there is that gambling instinct which is attractive to the average human being. I don't think they would sell as many straight penny goods as they are in addition to what they are now selling, enough to make up the business they do in this, I will call it, penny prize business, penny draws. That is what I call it.

Q. At least it is conjectural what percentage of any possible benefits from the cease and desist order would be obtained by interstate manufacturers as contrasted with intrastate manufacturers shipping in Illinois?

261 A. It is conjectural.

Q. It is no more than a matter of guesswork what the percentage of the benefit—

A. Yes.

Q. (Continuing) —would be?

A. Yes, it would be conjectural, answering your question.

Q. Testifying for your own companies, you don't feel that you would be yourself substantially benefited by stopping the break-and-takes?

A. Not substantially, but undoubtedly to a certain extent, because I am not strong on penny goods.

Q. Now, Mr. Mellen, you have sold break-and-takes to customers, have you not?

A. Oh, no; to jobbing customers.

Q. To jobbing customers?

A. Only.

Q. When did you cease?

A. I beg your pardon, sir?

Q. When did you cease?

A. Why, it has been so long, I haven't sold any for eight or nine years.

Q. Did your conscience bother you when you sold them?

A. Well, I don't know that it did.

Q. Didn't your conscience bother you, didn't you think it was something detrimental, something that made the

262 children or induced the gambling instinct?

A. Leaving the word "conscience" outside, I will say I know I would feel that I was contributing, or my house was contributing to the instigation of the gambling instinct in children. I will answer it that way. I can't

answer it any other way. If all the rest are doing it and I can make seven or eight thousand out of penny draws, it is a wide open matter and there must be, I probably would do it, and so would you, perhaps. Bunte took a high attitude on this question some years ago and deplored it. They resisted the penny draws for quite a while. I don't want to talk against Bunte's. They are friends of mine. I know Ted Bunte since he was that high, but nevertheless they fell for it quite a number of years ago after having talked against it.

Q. Then you feel from your observation and experience that Bunte's put out the product because the public demands it?

A. Yes.

Q. Do you think that as long as the public demands it there will be break-and-takes in Illinois?

A. Well, when we depend on Federal action, it will have to be done. They have marketed what you call punch boards, you know, secretly. There was a movement against this dice-shaking business, but you see it everywhere now. A parallel case are the pool rooms, wide open.

Q. That isn't my question.

263 A. If it would be against the law it would mostly stop it. No doubt it would stop the sale of penny draws mostly. I think perhaps it might stop it altogether if they took a firm stand on it.

Q. A separate law to prohibit it?

A. Yes.

Q. Do you feel if there is no special legislation such as that there will always be break-and-takes?

A. They will continue to do it, no doubt. It means business.

Q. Companies can spring up almost overnight and put them on the market?

A. It does make business, there is no question about that in my mind.

Mr. Krein: That is all.

Examiner Furnas: Anything further?

Mr. Kolinski: Just one further question?

Redirect Examination by Mr. Kolinski.

Q. The respondent in this suit marketed 86,000 units of the Ta-Ka Flyer assortment in 1936. If the respondent ceased making and selling those in the state of Illinois, is it your opinion that other manufacturers in the state of

Illinois as well as manufacturers outside of the state of Illinois would be placed on a basis of equal opportunity to regain some of that business which had gone into the break-and-takes?

264

A. If the break-and-takes are disbarred, you mean? Yes.

Q. My question is in the case of this respondent, if they did not make the 86,000 units which they made in 1936 that would place outside manufacturers as well as local manufacturers on an equal basis of competition to recoup their trade?

A. You mean if outside manufacturers offered pick-and-draws? That is right. There must be interstate commerce on that.

Q. If the respondent—

Examiner Furnas: I don't think the witness understood you.

By Mr. Kolinski:

Q. (Continuing.) —stopped making the 86,000 units that he made in 1936, thereby taking from the straight goods market that much available product or money, if he stopped making that, wouldn't the other manufacturers in the state of Illinois and the other manufacturers outside the state of Illinois who did not make break-and-takes, wouldn't they all be placed on an equal basis of competition for their share of the business that would be made available by that?

A. Why, they would be placed on an equal basis of competition, but no one can answer if they would get that business.

Q. In your opinion, they would be placed on an equal basis of competition?

265

A. It would remove an obstacle, no doubt.

Mr. Kolinski: That is all.

Recross Examination by Mr. Krein.

Q. It is conjectural what amounts, if any, they will secure?

A. Nothing but conjecture.

Mr. Krein: Thank you.

Mr. Kolinski: That is all.

Examiner Furnas: You may be excused.

(Witness excused.)

Examiner Furnas: Have you another witness?

Mr. Kolinski: Yes, I have. I will call Mr. Mack.

JOHN W. MACK, was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Kolinski.

Q. Your name is John W. Mack?
A. Yes.
Q. Where do you reside?
A. 2440 East 74th Street.
Q. City of Chicago?
A. City of Chicago.
266 Q. What business are you in?
A. Brokers business, candy brokerage business.
Q. What company do you represent?
A. I represent the Euclid Candy Company of Brooklyn.
Q. Approximately what volume of their product do you sell in the state of Illinois annually?
A. Oh, I would say it averages now around four to five thousand a month.
Q. Four to five thousand a month?
A. Yes.
Q. That covers the product for which you take orders in the state of Illinois—
A. That is it.
Q. (Continuing)—and transmit the orders to the place of manufacture in New York, and thereupon the orders are filled and the goods shipped from New York to the state of Illinois?
A. Yes.
Q. And your territory is the state of Illinois?
A. The state of Illinois.
Q. What are some of the lines manufactured by the Euclid Candy Company?
A. Love Nest, Best Pal, Kitchen Made Fudge, Good News and Dolly Dimple.
Q. Are any of those lines what are known as the
267 penny lines?
A. Yes. Kitchen Made Fudge is a penny line. Good News is a penny line.
Q. The other items?
A. They are five cent merchandise.
Q. They are in competition with the one-cent and five-cent field?
A. Yes.

Q. What class of trade do you call on?
A. It is wholesale jobbers of candy and tobacco.
Q. How many do you call on?
A. Here I would judge about fifty.
Q. And elsewhere in the state of Illinois?
A. I haven't been working through the state. I have confined myself or my activities to Chicago.
Q. How much experience have you had in the candy business?
A. Seventeen years with the William Wrigley, Jr. Company.
Q. The Wrigley Gum Company?
A. Yes.
Q. And the remaining period?
A. Two years and a half with the Goudy Gum Company.
Q. That is the Goudy Gum Company of Boston, Massachusetts?
A. Yes, and the remaining time in the candy brokerage business.
Q. How long have you represented the Euclid Company?
268 A. Three years.
Q. In the course of your experience in the candy business you have had occasion to become acquainted with some of the methods of retail selling in the candy industry?
A. To a certain extent, yes.
Q. Are you familiar with a mode of selling penny candies known as the break-and-take?
A. I am not familiar to a great extent due to the fact I have never carried the break-and-take, and, therefore, I haven't paid much attention to it.
Q. Do you know what they are?
A. I know what they are.
Q. You would recognize them?
A. Yes.
Q. You are aware of the trade distinction between the break-and-take assortment and what is known as straight goods?
A. Yes.
Q. You have seen the break-and-take assortments?
A. I have.
Q. In the house of brokers you have called on?
A. Yes.
Q. Have you seen the assortment manufactured by the

respondent in this case, Bunte Brothers, Incorporated, called Ta-Ka Flyer?

269 A. If I have, I haven't paid any attention to it.

Q. I will show you Commission's Exhibits 2-A and 2-B, 2-A being the front end of a box this size, and 2-B being a legend—

(Handing documents to witness.)

A. This here I have seen. This here I have not. (Indicating exhibits.)

Q. The contents of the box correspond with the legend which describes 160 chocolate creams, and of the chocolate creams twenty have an orange center?

A. Yes.

Q. The purchaser who procures an orange-center cream is thereby entitled to receive one of twenty assorted bars that are packed with the assortment, and the last purchaser of the 160 creams procures a half pound box of chocolates. Does that make it clear in your mind?

A. It makes it clear as you have explained it.

Q. That is the general principle upon which these break-and-take assortments operate, is it not?

A. As I say, to be truthful, I haven't given much attention due to the fact of never having sold one. I paid no attention to it. It was just like I might hear of this or that, this is selling or that is selling, as long as it does not interfere. If somebody was saying that fudge was selling I would be more interested in that piece

270 of fudge because that is my forte in trade.

Q. Are you aware there are break-and-take assortments being sold in the Chicago area?

A. I believe there are. I believe there are.

Q. From your experience in the candy business, have you formed an opinion as to what effect the sale of break-and-takes has upon the total volume of straight candy merchandise that is sold?

A. No, I haven't.

Q. You haven't formed any opinion?

A. No.

Q. Do you carry a break-and-take assortment?

A. No, sir.

Q. Have you any personal opinion about a break-and-take assortment?

A. I haven't, because, as I say, I have given it no attention whatsoever.

Q. Do you know whether the sale of break-and-take assortments detracts from the volume of straight goods that may be sold?

A. It may be in some sections it would, but the way I

have always figured from the lines I have carried, if it had an eye appeal and a taste to the youngster, regardless of something else that would interfere, he would still go back to that piece.

271 Q. Have you been asked for a break-and-take assortment by any of your trade?

A. No, never have.

Q. How freqently do you see these break-and-take assortments among the jobbers that you call on?

A. That would be asking me something—as I say, if I was to call on a jobber and look over his stock, I might happen, as I say, like a label might be in front of me and I would see it.

Q. You don't make it a practice when you call on your trade to look over your jobbers' stock?

A. No, just my own, just my own line, that is all.

Q. And you have not been asked for the break-and-take assortment?

A. No, sir, I have not.

Q. Do you cover portions of the state other than Chicago?

A. I have. Recently, last week, I was in St. Louis.

Q. Have you been in other portions of the state of Illinois?

A. Yes, I have.

Q. Are there some sections of the state in which break-and-take assortments are more prevalent than others?

A. I could not say.

Q. Where did you last see the Ta-Ka Flyer break-and-take assortment?

272 A. I think just along like on Halsted Street, I might see a bunch of boxes or talk to the Bunte salesman, I just happened to take a glance, the Bunte name, naturally it is predominant throughout this section.

Mr. Kolinski: I think that is all.

Mr. Krein: No cross-examination.

Examiner Furnas: You are excused.

(Witness excused.)

Examiner Furnas: Is there anything further?

Mr. Kolinski: I think we will adjourn subject to reinstatement of the hearing upon five days notice.

Examiner Furnas: Let the record show we will stand adjourned until five day notice is served on the respective parties, the Examiner ordering reconvening of the hearing under this docket. You are now adjourned.

(Whereupon, at 1:45 p. m., Central Standard Time, May 5, 1937, the hearing in the above entitled matter was adjourned without date.)

275 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—2695) * *

Room 223 Federal Building,
Indianapolis, Indiana,
June 23, 1937.

Met, pursuant to notice, 10 a. m.

Before:

Miles J. Furnas, Examiner.

Appearances:

P. C. Kolinski, attorney for the Federal Trade Commission.

Leroy R. Krein, appearing for Respondent (105 West Adams Street, Chicago, Illinois).

276 PROCEEDINGS.

Examiner Furnas: What is the number of this docket?

Mr. Kolinski: 2695.

Examiner Furnas: What is this case?

Mr. Kolinski: Bunte Brothers, Incorporated. It is the intrastate count.

Examiner Furnas: Mr. Reporter, you will note that the hearing is convened and will now be in order in the matter of the proceedings of the Federal Trade Commission against Bunte Brothers, Incorporated, docket 2695, as scheduled by order of the Commission for hearing in the City of Indianapolis, State of Indiana, room 223 Federal Building, on the 23d day of June, 1937, with Mr. P. C. Kolinski appearing as counsel for the Commission and Mr. L. R. Krein as counsel for the respondent present.

The respondent in these proceedings is charged with having violated Section 5 of the Federal Trade Commission Act.

If you gentlemen desire a copy of these proceedings it will be necessary to see the reporter here, who is not an employee of the Commission or of the Government.

What is your further pleasure?

Mr. Kolinski: I will call Mr. Homer J. Williamson as a witness and ask that he be sworn.

277 HOMER J. WILLIAMSON was thereupon called as a witness on behalf of the Commission and, having been first duly sworn, testified as follows:

Direct Examination.

Examiner Furnas: What is your name?
The Witness: Homer J. Williamson.
Examiner Furnas: Proceed.

By Mr. Kolinski:

Q. What business are you in, Mr. Williamson?
A. Manufacturing candy business.
Q. What is the firm name?
A. Homer J. Williamson, Incorporated.
Q. And where is it located?
A. 541 North East Street, Indianapolis, Indiana.
Q. What product does it manufacture and sell?
A. Candy.
Q. What types of candies?
A. Bar candies, stick candies and bulk candies.
Q. Does it manufacture what are known as penny goods?
A. No, sir.
Q. Where is that product sold?
A. In all States east of the Rocky Mountains.
Q. Do you make sales of your product in the State of Illinois?
A. Yes, sir.
Q. Approximately what volume have you been 278 selling in Illinois?
A. I couldn't give anything but an estimate.
Q. Yes, just that.
A. Well, $3,000.00 a year, probably.
Q. And how have you been selling your product in Illinois?
A. Through brokers to the jobbers.
Q. For how long have you been selling your product in Illinois?
A. Approximately fifteen years.
Examiner Furnas: How long?
The Witness: Fifteen years.

By Mr. Kolinski:

Q. How long have you personally been identified with the candy industry?
A. Since April 1, 1908.

Q. And in what capacity?
A. Owner of the business.
Q. And in what types of candy business have you been?
A. Retail, jobbing and manufacturing.
Q. For how long a pe iod were you in each of the classifications?
A. About two years in the retail business. That was during the same period that I was in the wholesale business.
Q. How long were you in the jobbing business?
A. I was in the jobbing business 21 years; the
279 first 21 years of my candy experience.
Q. And how long have you been manufacturing?
A. 25 years. Since 1912.
Q. Are you familiar with a type of candy assortment known as break-and-take or deal assortment as distinguished from straight merchandise in the candy industry.
A. Yes, sir.
Q. I show you Commission's Exhibits 1, 2-A and 2-B in this docket, referring to Summer Bar Assortment and Ta-Ka Flyer Bar Assortment, and ask that you examine them.
A. Yes, sir, I have seen those kind.
Q. Are you familiar with the operation of such assortment?
A. Yes, sir.
Q. On that Ta-Ka-Flyer Bar Assortment there are 160 chocolate creams, of which 140 have white centers known as vanilla creams and 20 have orange centers. In addition there are 20 assorted bars of a value greater than one cent and a one-half pound box of chocolates of a value in excess of twenty-five cents. The purchaser of one of the creams which has an orange center receives in addition one of the twenty assorted bars, and the last purchaser of the one of the 160 creams receives the half-pound box of chocolates. Is that the form in which these break-and-takes are usually prepared?
A. Yes, sir.
280 Q. Have you an opinion from your experience in the industry as to the effect of break-and-takes upon legitimate candy business in one-cent goods, five-cent goods and package goods; the effect of these break-and-takes?
A. No, sir.
Q. What is that opinion?
A. The candy buyer is led to buy the break-and-take

or the idea that has something free or special over the legitimate bar.

Q. And is there any effect upon manufacturers' sales to jobbers of the prevalence of break-and-takes in the hands of jobbers?

A. Ask that question again, please.

Q. I will reframe the question.

Does the fact that a jobber is handling break-and-take assortments have any effect upon the straight business that a manufacturer who does not manufacture breaks does with that jobber?

A. Yes, sir.

Q. What effect is that?

A. Well, jobbers and retailers both. Especially you are speaking about jobbers. They follow the line of least resistance, and it is easier to sell chance candy than it is straight candy.

Q. And is it the practice of jobbers when they
281 place their order for chance candies also to give to the party who sells them chance candies a portion of their straight goods business?

A. Yes, sir.

Q. Does that operate to the detriment of the manufacturer who does not sell chance candies?

A. I think so.

Q. In your business in the State of Illinois, where the respondent sold 86,000 units in 1936 of the assortment called Ta-Ka-Flyer, have you found any effect on your business in that State from the sale of break-and-takes?

A. I couldn't say that I could prove it to this particular line, but I do know that my business in Illinois has fallen off due to break-and-takes.

Q. Just what is that result? State the facts.

Mr. Krein: Your Honor, the witness has already stated that he does not know definitely and he cannot state the effect of the respondent's break-and-takes on his business. Now, we are not here interested in any other break-and-takes but the respondent's.

Examiner Furnas: I will allow him to answer the question.

Mr. Krein: I object, or except, rather.

Examiner Furnas: Yes. Exception granted.

Mr. Kolinski: I will ask a further qualifying
282 question.

By Mr. Kolinski:

Q. The respondent's 86,000 units were sold through 690 jobbers located in the State of Illinois. Is it possi-

ble that some of those break-and-takes so marketed by respondent were marketed through distribution channels that you were seeking to use?

A. Yes, sir.

Q. Now, state the fact as to the effect on your business.

A. Well, there was one piece of candy that we made that we had a better business on in Illinois than any other State outside of Indiana, and that was a piece of candy called Hash Bar. Now, while we formerly had a good repeat business on that and we had even improved the size and quality of it, the business on that piece dropped off in Illinois. Not so in other States.

Q. Did you make an investigation to see why it dropped off?

A. No, not personally.

Q. Did you solicit reports as to why it dropped off?

A. Well, the brokers, not only in Illinois, but other States—

Q. I want you to confine your answer to what report you received on Illinois.

A. All right. Well, our broker, Mr. Homer Schields, frequently told me that—

283 Mr. Krein: I object to any statements made to the witness by anyone else on the ground that they are hearsay.

Examiner Furnas: He may answer that.

Mr. Krein: Exception.

Examiner Furnas: Objection overruled; exception granted.

The Witness: Mr. Schields frequently told me that he could get business on draws and that there was so many draws being sold of different types; that was one excuse he had for not bringing me any business; and he handled other lines of draws and break-and-takes of other firms and he would state to me that he secured a good business on those items.

By Mr. Kolinski:

Q. Did your business in the State of Illinois on the piece that you named, Hash, fall off, or did you notice?

A. Yes, sir.

Q. To what extent?

A. Well, I would say 75 per cent, a very great extent.

Q. And from your investigation and your judgment and the reports you received you ascribe it to the prevalance of break-and-takes in Illinois?

A. I think that undoubtedly had quite a good deal to do with it.

Mr. Kolinski: You may cross examine.

284 *Cross-Examination by Mr. Krein.*

Q. When was the Hash Bar first originated?

A. It has been so long ago, I don't remember, but it has been ten or fifteen years.

Q. Ten or fifteen years?

A. Yes.

Q. Is that a penny bar or a nickel bar?

A. It is a five-cent bar.

Q. When was the peak of your sales in Illinois on your Hash Bar?

A. 1905.

Q. What?

A. I mean '35.

Q. 1935. How long prior to that time had you been selling in Illinois?

A. Well, our sales in Illinois, of course, were not as heavy as they were—at that time, as they were in Indiana.

Q. How long had it been selling in Illinois, the Hash Bar?

A. Since 1934.

Q. How long had it been selling in Illinois, the Hash Bar?

A. Since 1934.

Q. And it originated in 19—

A. Fifteen—

Q. (Continuing)—23?

285 A. Probably fifteen years. I am guessing at that. I don't remember exactly the time, but at least fifteen years.

Q. Why wasn't it sold prior to 1934 in Illinois?

A. Because, as I said, we were in the jobbing business up until 1929 and we didn't work the jobbing trade there as closely before that as we did afterwards.

Q. Had it been selling any place?

A. Yes; before we dropped the jobbing business we sold most of our candy in Indianapolis.

Q. In 1934 and 1935 the Hash Bar was competing with other candies sold in Illinois?

A. That is right.

Q. And it reached its peak in 1935?

A. That is right.

Q. There were penny break-and-takes sold in competition with it, were there not?

A. Yes, sir.

Q. And it reached its peak in 1935 in the face of all the competition?

A. Yes, sir.

Q. Are you acquainted with Chicago jobbers, Mr. Williamson?

A. Some of them.

Q. Isn't it a fact that most Chicago jobbers demand certain concessions on the part of manufacturers before they sell their candies?

286 A. I have been told that they do.

Q. Did they ever tell you?

A. Yes.

Q. Do you give it to them?

A. In some cases. I might qualify that by saying that we do very little business in Chicago.

Q. Now, how much business of the three-thousand a year in Chicago do you do, in volume?

A. Almost nil.

Q. Almost nothing?

A. Yes, in the City of Chicago.

Q. Are you acquainted with the penny goods sold in Indiana?

A. Not nearly so much as I was before I discontinued the jobbing business.

Q. Are you acquainted with the Bunte product called Pippin?

A. Yes, sir.

Q. That is penny candy?

A. Yes, sir.

Q. That is sold today?

A. I don't believe it is sold as penny candy by Buntes. I think it is sold by the pound.

Q. I mean, it retails for a penny.

A. I think it can be retailed for a penny.

Q. Well, it actually does retail for a penny.

287 A. Yes, sir, I think it does.

Q. And it is sold in large quantities in Indiana, is it not?

A. I am not as familiar with that. Just like the other, I don't know, but I have observed it on the counters.

Q. Haven't you seen it in jobbers?

A. Not so much, because I don't call on very many of the jobbers.

Q. Don't you see it in practically every retail store you go in?

A. No.

Q. Do you see a substantial amount of it?

A. I have noticed it, I believe, in the—

Mr. Kolinski: Your Honor, I don't see the materiality of this line of examination.

Examiner Furnas: Well, I am going to let him go ahead and see where it goes to. Go ahead.

The Witness: I noticed it recently in the Haig Drug Company. They had it prominently displayed on their counter by the cash register.

By Mr. Krein:

Q. Going back to the Chicago jobbers, Mr. Williamson; then when you give your concessions to the jobbers, you actually give them free merchandise; isn't that correct? You give them more than you charge for?

A. No, don't give them any free merchandise.

288 Examiner Furnas: A little louder, please.

The Witness: I say, I didn't give any free merchandise.

By Mr. Krein:

Q. Don't you give more than they can charge for?

A. No, sir.

Q. You just give special prices, is that right?

A. It amounts to that, yes. That was in one particular case in the past, which is now, of course, outlawed.

Q. If most of the Bunte break-and-takes are sold in the Chicago area, the break-and-takes put out by Bunte are not hurting your business then, are they?

A. Only indirectly.

Q. Well, they are not hurting your business if you sell outside of Chicago and their candy is sold mostly in Chicago?

A. I might be able to sell my bars in Chicago if there wasn't so many break-and-takes and draws.

Q. Have you ever tried to sell in Chicago?

A. Yes, sir, I have.

Q. Could your bar compete with the other Bunte bars that are not sold in Chance assortments, such as Tango?

A. I am always willing to put my candy up against any other one on the same basis.

Q. Have you ever heard of B. B. Bats?

A. Yes, sir.

289 Q. One-cent Baby Ruths?

A. Yes.

Q. O'Henry?

A. Yes, sir.
Q. Butter Fingers? Hershey Bars?
A. Yes, sir.
Q. Those products are being sold in Illinois at the present time?
A. Yes, sir.
Q. I can't hear you, Mr. Williamson.
A. Yes, sir, I presume they are. I haven't been over there to see myself. I take it for granted they are.
Q. Do you know from your experience or from statements made to you that they are?
A. I don't think I could prove it.
Q. How do you know that break-and-takes are sold in Illinois?
A. Because my brokers told me they were.
Q. Assuming that B. B. Bats and the other one-cent items named are sold in Illinois, they are competing, therefore, with penny break-and-takes, are they not?
A. Any candy competes with any other candy.
Q. Isn't it probable, then, that the reason your bar isn't selling in Chicago is the nature of the bar rather than the fact that there are break-and-takes on the markets?
A. My bars are no different from other bars.
290 Q. But you sold the Hash candy bar in the face of competition, did you not?
A. Over a period of time, yes.
Q. Do you advertise in Illinois?
A. No, sir. We are not big enough to advertise anywhere.
Q. Assuming a quality bar, has a known, advertised bar got a chance, in your opinion, to compete with an advertised bar?
The Witness: I don't understand that question.
Mr. Krein: Read the question.
(The question referred to was read by the Reporter.)
The Witness: Certainly, yes. I don't think that advertising bars is a very great percentage of what makes them sell.
Examiner Furnas: Off the record.
(There was a discussion off the record.)
Mr. Krein: That will be all.
Mr. Kolinski: Is that all?
Examiner Furnas: Is there anything further?
Mr. Kolinski: Nothing further.
I want to recall Mr. Williamson for just one question that I think is in the record.

Redirect Examination by Mr. Kolinski.

Q. Mr. Williamson, during the years 1934 and 1935 was there any provision in the Code of the National
291 Recovery Administration as to break-and-takes concerning the candy industry?

A. Yes, sir?

Q. What was that?

A. They were supposed to be outlawed.

Q. Was that in the period when you reached your peak in Chicago, when breaks were forbidden by the Code of the Confectioners?

A. I think that Code went into effect in '33, didn't it, the latter part of '33?

Q. The latter part of 1933.

A. And I don't know just how long it held over there, but it was supposed to be in effect until after the N. R. A. was outlawed.

Q. Yes, and the Schechter decision came in late May of 1935, and when did you find that breaks—

Mr. Krein: I object to all this, your Honor. The witness doesn't know.

By Mr. Kolinski:

Q. Well, do you know when the Code of the Confectioners became ineffective?

A. After the outlawing of the N. R. A.

Q. Yes, and do you know when break-and-takes became more prevalent in the Chicago area and Illinois?

A. Well, in the latter part of 1935 and 1936.

292 Q. And that was after you had reached the peak of your sales?

A. Yes.

Mr. Kolinski: That is all.

Examiner Furnas: Cross-examine.

Mr. Krein: Just a second.

Recross Examination by Mr. Krein.

Q. To your knowledge do you know of any company that stopped making break-and-takes during the N. R. A. Code?

A. Yes, sir.

Q. In the Chicago area?

A. No, I don't know in the Chicago area, no. I know they should have, because it was a Government ruling.

Q. In Illinois do you know of any manufacturer that

stopped making break-and-takes and stopped selling them in Illinois during the time the N. R. A. was effective?

A. I imagine they all did, but I don't know. They all subscribed to the N. R. A. Code.

Q. Do you know whether or not they did, though? Yes or no.

A. No.

Mr. Krein: That is all.

By Mr. Kolinski:

Q. You know as a fact that the manufacturers in the confectionery industry throughout the country cooper-
293 ated with the National Recovery Administration during the period it was in effect?

Mr. Krein: I object, your Honor. That is a conclusion.

The Witness: Yes, sir.

Examiner Furnas: Well, if the witness knows.

Mr. Krein: In the Schechter case they didn't observe the N. R. A.

Examiner Furnas: If the witness knows, he may answer the question.

The Witness: All the ones that I know of cooperated. I know they did in Indianapolis, and I imagine they all did.

By Mr. Kolinski:

Q. And you cooperated yourself?

A. Yes, sir.

Mr. Kolinski: That is all.

Examiner Furnas: That is all.

(Witness excused.)

Mr. Kolinski: All right, Mr. Herran.

FRED H. HERRAN, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination.

Examiner Furnas: What is your full name?

The Witness: Fred H. Herran.

294 Examiner Furnas: All right, proceed.

By Mr. Kolinski:

Q. What business are you in, Mr. Herran?

A. Candy manufacturing.

Q. And where is your plant located?

A. Huntington, Indiana.

Q. Give us the firm name.
A. Phyleen Candy Company.
Q. What types of candy does your company make?
A. Five-cent bars.
Q. And where are they sold?
A. Throughout the eastern States and the middle west.
Q. Are they sold in the State of Illinois?
A. They are, yes.
Q. And in what types of stores are they sold?
A. They are sold in practically all retail candy stores that handle candy.
Q. And they are sold in candy stores where other five-cent bar goods are sold?
A. Yes.
Q. And where one-cent penny goods are sold?
A. That is right.
Q. What position do you hold with the company?
A. President.
Q. How long have you been in the candy business?
295 A. Twelve years.
Q. In what capacity?
A. As salesman, plant manager and president to the company.
Q. Do you have occasion as part of your duties in that business to call on the trade?
A. I do, yes.
Q. How much of that do you do?
A. Well, at the present time I work the State of Ohio and the northern half of Indiana.
Q. What distributors do you call on?
A. Just the wholesale candy and tobacco distributors.
Q. Do you ever call on retailers?
A. Don't call on the retail trade.
Q. In the course of your work have you become acquainted with retail methods of selling?
A. Yes.
Q. As a result of your experience in the candy industry are you acquainted with what are known as break-and-takes?
A. I am.
Q. Do you know the difference between a break-and-take deal and ordinary straight candies?
A. I do.
Q. You are aware that the principle of a break-and-take is to combine in an assortment a certain number of uniform pieces of candy and a certain number of
296 larger ones to be given as prizes and a means or mode

or determining which purchaser of a uniform piece of candy procures the larger prize?

A. That is true.

Q. I show you Commission's Exhibits 1, 2-A and 2-B. Just read these over and familiarize yourself with them.

A. Yes.

Q. From Exhibit 2-B in particular your attention is called to the fact that the assortment consists of 160 chocolate creams; 140 of these have white or vanilla centers; 20 have orange centers. There are, in addition, in the assortment 20 assorted bars that are worth from three to five cents. The chocolate creams, the entire 160, are designed to sell at retail at one cent each. There is, in addition, a half-pound box of chocolates valued at about twenty-five cents. The purchaser at one penny of one of the chocolate creams, if he procures one with an orange center, receives one of the twenty bars, and the last purchaser of the 160 creams procures a half-pound box of chocolates. That measures up to what the general scheme is on break-and-takes, is that right?

A. That is right.

Q. In your experience in the candy industry generally have you formed an opinion as to the effect of break-and-take assortments upon the straight candy business in
297 general? Just yes or no on that question.

A. No, I haven't.

Q. You haven't formed an opinion?

A. Of the amount of business that they take from the other field?

Q. No; just have you formed an opinion as to any effect they have upon straight business.

A. Yes, I have.

Q. What is that opinion?

A. That they detract from the sale of the straight penny or five-cent merchandise.

Q. By that you mean that the amount of money spent on breaks is that much money taken away from what would be used for straight bulk and penny goods merchandise?

A. That is my opinion.

Q. Yes. Have you observed any effect that break-and-takes sold by a jobber have upon that jobbers business with a manufacturer who does not sell break-and-takes?

A. Well, it gives the manufacturer that has other merchandise to sell along with his break-and-takes, it gives him an advantage over the fellow that doesn't have the break-and-takes to sell.

Q. Just what is that advantage?

A. Well, when he is placing an order it is often that they cannot buy sufficient amount of straight selling
298 merchandise to make shipping weight; where, if they have these break-and-takes, they add this along in smaller quantities. To get shipment at the same time are buying their break-and-takes.

Q. So that the jobber who sells break-and-takes, you find, gives considerable of his straight goods business to the manufacturer who supplies him with break-and-takes?

A. It makes it easier for him to give them the business along—on account of the shipping weight.

Q. And to that extent you have found that it has proven detrimental to the manufacture who does not manufacture break-and-takes?

A. Yes, I have.

Q. Your product is sold—the product of your company is sold in the State of Illinois?

A. It is.

Q. In the State of Illinois the respondent in 1936 sold 86,000 units of the assortment called Ta-Ka-Flyer Bar Assortment, dealing through 690 brokers. Have you found that the sale of break-and-takes in the State of Illinois has had any effect upon your business in the State of Illinois?

A. We feel that it has, yes.

Q. What has that effect been?

A. In amount of business, you mean?

Q. What has the effect been on your business?

A. You mean in the percentage of our business; is
299 that what you mean?

Q. No; whatever effect these break-and-takes in Illinois have had.

Examiner Furnas: Was it beneficial or detrimental?

The Witness: Detrimental.

Examiner Furnas: That was what you wanted, wasn't it?

Mr. Kolinski: Yes.

By Mr. Kolinski:

Q. Your salesmen are frequently asked to furnish break-and-takes?

A. They are.

Q. And have you found that there are many instances where they could sell your goods if they had the break-and-take?

A. Yes, we have.

Q. Do they find it harder to sell your goods unaccompanied by any break-and-take?

A. Yes.

Q. Do you feel that if break-and-takes were not sold in the State of Illinois that your business would benefit?

A. I believe we would sell more merchandise.

Q. You consider the break-and-takes being sold in Illinois as a definite handicap then?

A. I do.

Mr. Kolinski: I am going to ask counsel a short 300 question.

No further direct examination.

Mr. Krein: I haven't anything.

Mr. Kolinski: No cross?

Mr. Krein: No.

Examiner Furnas: Cross examine.

Mr. Krein: No cross.

Examiner Furnas: All right, you may be excused.

(Witness excused.)

Examiner Furnas: Off the record.

(There was a discussion off the record.)

Examiner Furnas: Now, what is the adjournment you want?

Mr. Kolinski: This case, your Honor, I ask be adjourned subject to five days' notice to respondent or its counsel.

Examiner Furnas: Mr. Reporter, you will note that the hearing is now closed and we will stand adjourned subject to the usual five days' notice to the respective parties.

The hearing is now adjourned.

(Whereupon, at 3 o'clock p. m., June 23, 1937, the hearing in the above-entitled matter was adjourned.)

303 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—2695) * *

Room 1123, New Post Office Building,
Chicago, Illinois,
July 24, 1937.

Met pursuant to notice at 10 o'clock a. m. c. s. t.

Before:

Irving D. Royal, Examiner.

Appearances:

P. C. Kolinski, Attorney for the Federal Trade Commission.

LeRoy R. Krein, Attorney for the Respondent. (105 West Adams Street, Chicago, Illinois.)

304 PROCEEDINGS.

Examiner Royal: Are you ready to proceed?

Mr. Kolinski: Yes.

Examiner Royal: The last hearing in this matter was held at Indianapolis, Indiana, on June 23. Let the record show that this is a reconvening of the hearing in the matter of Bunte Brothers, Incorporated, Federal Trade Commission Docket 2695, pursuant to notice and agreement and let the record show this hearing is being held at 1123 New Post Office Building, Chicago, Illinois, and is reconvening at ten-fifteen o'clock a. m. central standard time; also that counsel for the Commission and counsel for the respondent are present, Mr. P. C. Kolinski for the Commission and Mr. Leroy R. Krein for the Respondent.

The hearing will now be in order.

Mr. Kolinski: Mr. Examiner, I want to state Mr. Krein has been courteous in his cooperation. Sometimes these notices are a little bit short. There is no problem at this time about shortage of notice?

Mr. Krein: None whatsoever.

Mr. Kolinski: I will call Mr. Farnsworth as a witness and ask he be sworn. He is here under subpoena.

GEORGE M. FARNSWORTH was thereupon called as a witness on behalf of the Commission, and, having been first duly sworn, testified as follows:

305 *Direct Examination by Mr. Kolinski.*

Q. What is your name?
A. George M. Farnsworth.
Q. Where do you live?
A. 7141 Euclid Avenue.
Q. What business are you in?
A. Well, as you might call it, a confectioner broker. Well, I handle other lines besides, but confectioner broker.
Q. How long have you been in that business?
A. About six years.
Q. Six years. Were you engaged in that business during the year 1935?
A. Yes, sir.
Q. Did you, in the course of that business solicit sales of candy in the state of Illinois?
A. Yes, sir.
Q. What portion of Illinois?
A. During 1935 I got credit for certain lines throughout the state, but I covered from Springfield, north.
Q. From Springfield, north?
A. Regularly.
Q. And the early part of 1936, particularly the month of January, 1936?
A. The same.
306 Q. And what companies did you represent at that time?
A. Well, I represented a number of concerns; the National Licorice Company of Moline, well, the general offices are down in New York, but Moline is where I work out of.
Q. And what others?
A. The Gowdy Gum Company.
Q. Where are they located?
A. Boston.
Q. Boston, Massachusetts?
A. Yes, sir.
Q. What other?
A. Now, the latter part of 1935 I represented the Klotz Confection Company of Louisville, Kentucky.
Q. Any other concern?

A. Yes.
Q. What other?
A. The Terry Candy Company.
Q. Located where?
A. Elizabeth, now, New Jersey. Now, do you want others, for instance, the Illinois Candy Company of Chicago?
Q. No. You didn't represent any other outside candy companies located in states other than Illinois?
A. I had odds and ends I really thought would make a go and I would like to handle them, this and that. I had other concerns, like I was dealing in specials on
307 Japanese novelties, a New York concern. I only had it for a couple of months. It was only good a couple of months. It was something which I sold to different confectioners.
Q. The Terry Candy Company have a line of five-cent bars?
A. Five-cent bags and one-pound boxes.
Q. Was that sold to the general candy trade?
A. Well, wholesale grocers, confectioners, wholesale tobacco people. I only call on the wholesale trade only.
Q. To your knowledge was it distributed to candy retailers located in the state of Illinois?
A. Yes, sir.
Q. The Klotz Confection Company of Louisville?
A. They put out two bars, a peanut brittle and a five-cent fudge and also a penny fudge. I don't do so well with penny fudge. I get more returns on the five-cent items.
Q. You have sold the penny fudge?
A. Yes.
Q. To jobbers in the state of Illinois?
A. Yes, the only place I have that line.
Q. That is your exclusive territory?
A. Yes, sir.
Q. You don't sell outside?
A. No.
Q. The penny Klotz Confection Company bars were sold to jobbers for distribution to the retail trade in the state of Illinois?
308 A. Yes, sir.
Q. They are located at Louisville, Kentucky?
A. Yes, sir.
Q. The Gowdy Gum Company of Boston, Massachusetts, what was their line?

A. Well, they have five-cent gums and penny gums, but my specialty is penny gum, not so good with the five-cent gums to compete with the nationally advertised products.

Q. That five-cent gum you sell within the border of the state of Illinois to jobbers?

A. Yes, sir.

Q. And the Gowdy line of penny gums?

A. Penny gums.

Q. That was sold for distribution eventually to retail trade in Illinois?

A. Yes, sir.

Q. The National Licorice Company has plants located outside of this state also?

A. Moline, Philadelphia and Brooklyn.

Q. Philadelphia, Pennsylvania?

A. And Brooklyn, New York.

Q. And were any penny lines shipped to this state from either place?

A. Not in 1935.

Q. Were five-cent lines shipped here?

309 A. Well, a couple of shipments.

Q. From which plant?

A. I think both Philadelphia and Brooklyn, but they don't sell.

Q. But there were shipments made in 1935?

A. I mean myself. Possibly there were some shipments made from Philadelphia, yes, sir.

Q. But the bulk of your business for the National Licorice Company was from Moline?

A. From Moline, because they put out a general line mostly.

Q. During 1935, approximately what volume of business did you sell in this state for the companies you have named?

A. Now, I didn't mention—do you want me to include the other concerns I was with?

Q. Just the four we have named, the Gowdy Company, the National Licorice Company, the Klotz Company and the Terry Candy Company.

A. What amount do I have to specify? I haven't any reports.

Q. Just state approximately.

A. All the way from $25,000.

Q. Did you sell as much as $50,000?

A. Including all my lines, I did.

Q. Of the business which these companies shipped into the state of Illinois, the Gowdy Gum Company and the others?

A. Well, say, $50,000, probably.

310 Q. During the year 1935?

A. I may be wrong. It doesn't make any difference, does it?

Q. Was it in excess of $40,000?

A. Well, it was around that, I will say. Of course, I have other lines that make me more money than these lines here.

Q. We are concerned with these lines here.

A. Yes, sir.

Q. How many jobbers' accounts do you serve in the state of Illinois, approximately?

A. Well, I pick out the ones that are paying their bills. There is a whole lot of these jobbers in Illinois that are shaky.

Q. About how many accounts do you serve regularly?

A. I will say one hundred.

Q. You have visited some retail stores in this state, have you?

A. Well, I have a few accounts where they are called wholesalers and retailers. As a rule I don't call on the retailers because there is enough grief attached to my lines. I haven't any to speak of, the nationally advertised bars. I call on the jobbing trade only. You will have grief if you sell the retailers and jobbers both.

J. Just answer the question. In the course of your business you have occasion to see some retail candy stores in operation, do you not?

A. I go in to buy a cigar or soda water, some-

311 thing like that, that is about all I know.

Q. As an average business man engaged in that line—

A. That is all.

Q. (Continuing.) —you retain a professional interest in it?

A. Yes, sir.

Q. Are you acquainted with a form of distribution of candy known as the break-and-take assortment, being an assortment which involves the use of the element of chance as distinguished from the sale of straight goods? Are you acquainted with such general forms called break-and-takes?

A. They are on the market, yes, sir.

Q. I show you Commission's Exhibit 2-A and 2-B in this case, being the box description and the content description of an assortment called Ta-Ka Flyer assortment. (Handing exhibits to witness.) In that assortment there are 160 chocolate creams designed to retail at one cent each. Among those creams are 140 vanilla creams and 20 with orange centers. The orange is disclosed upon breaking the cream. And in addition, there are 20 assorted bars and a one-half pound box of chocolates. The consumer who purchases one orange centered cream, after paying one cent for the cream, procures in addition one of the 20 assorted bars and the purchaser of the last of the 160 creams procures the half pound box of chocolates. You are acquainted with such
312 type of assortment and you have seen such assortments in the state of Illinois?

A. No, I am not acquainted. I haven't to my knowledge seen that Ta-Ka Flyer assortment.

Q. The particular one you have not seen?

A. Yes, sir. May I add this, gentlemen? For instance, if the jobber tells me, the stock room, you are not supposed to go back there, but I am well acquainted, to go back there and see how the stock is as to certain lines I sell, and I pay no attention to the other manufacturers of merchandise. Like mint lozengers, I sell quite a lot of mint lozengers and jelly beans, I don't care what competitive line of lozengers the jobbers have in stock.

Q. You are interested in your own stock?

A. I know naturally the number of boxes or cases of my merchandise they have there with the other merchandise. I pay no attention to the competitive line of merchandise.

Q. We will have a big record. Just confine yourself to answering the questions.

A. Yes.

Q. You have seen penny break-and-take assortments offered to the candy trade, both jobber and retailer, in the state of Illinois during the year 1935?

A. Yes, sir.

Q. Has it been your observation during the pur-
313 suit of your business selling candy in the state of Illinois in the year 1935 that the volume of break-and takes sold in the Illinois market detracts from the volume of straight goods sold in the state of Illinois?

A. In certain places, certain times, yes, sir.

Q. Has it been your observation that certain job-

bers in purchasing candies will also purchase from manufacturers who sell a break-and-take assortment other goods that are known as straight goods along with the break-and-take assortment?

A. It has been my observation to notice, you say, the merchandise?

Mr. Kolinski: Read the question, please.

(Record read by the reporter.)

A. Yes, sir.

By Mr. Kolinski:

Q. In other words, you have found that helps some manufacturers to dispose of their straight goods if they carry a break-and-take assortment?

Mr. Krein: That is a leading question. That is not what the witness said at all. He merely said some jobbers sell break-and-take and other types of merchandise. The witness did not say the sale of these—

Mr. Kolinski: I will withdraw the question.

Examiner Royal: The objection will be overruled at this time. I assume Mr. Kolinski will reframe his question.

314 By Mr. Kolinski:

Q. What has been your observation in that regard?

A. Well, my observation is, of course, I am never in a jobbing place, I have not been any place where men came in selling break-and-takes like that. That is all right?

Q. Have you had opportunity to note the business of manufacturers' representatives who have sold break-and-takes?

A. No, sir.

Mr. Kolinski: No further questions.

Cross-Examination by Mr. Krein.

Q. How many penny items do you sell besides the penny fudge?

A. Well, I got the National Licorice, I don't know how many numbers they have. The Illinois Candy Company, I have a few penny goods from them in the fudge line and the gum, I have five or six numbers from the gum company. As far as penny goods, my way of selling merchandise, I sell mostly bulk. I haven't the penny goods for my territory. Am I answering that?

Q. You stated your total volume you thought was around $25,000. Then you thought it was around $40,000?

A. I wanted to know if it was all right to say $25,000 or more.

Q. Does that $25,000 or $40,000 figure include novelty items and other items that you carry other than candy items?

That figure you gave—

315 A. No.

Q. (Continuing)—was that for candy alone?

A. I just gave the names of the four concerns I represented. That was all he wanted.

Q. In your opinion do you think it is closer to $25,000 than it is to $40,000?

A. Between $25,000 and $40,000.

Q. What percentage of that total volume between $25,000 and $40,000 was in your opinion made up of penny goods sales?

A. Well, the greater percentage on account of licorice. I haven't the whole state of Illinois on licorice.

Q. In your opinion does the sale of break-and-takes in Illinois affect your business?

A. No, I will say not.

Q. What did you mean when you said it detracts from the sale of straight candies in certain places and certain times?

A. Well, there is no doubt some places they sell them, these what do you call them—

Mr. Kolinski: Break-and-takes.

A. (Continuing)—break-and-takes, and some of these jobbers are fly-by-night, they will work these punch boards, whatever you call it—

Mr. Krein: Break-and-take.

A. (Continuing)—break-and-takes. You know how that is. In other places I call on, the wholesale grocers,

316 my bulk line, they don't handle any break-and-takes, and all these legitimate jobbers I call on who have been in business for years, they won't agree to have anything like that.

By Mr. Krein:

Q. How do these fly-by-night jobbers who press the sale of break-and-takes detract from the sale of straight candies, would you say?

A. Well, a lot of so-called sedan jobbers, they are here today and away tomorrow, they have a few dollars and they will buy a case of that assortment of that kind and when they get a job they will quit their candy business.

Q. From your experience in the selling of candy in Illinois, is it your opinion that if a company has a product,

a penny item, for example, that is appealable to the purchasing public that they will be able to sell that item in competition with break-and takes?

A. Yes, sir.

Q. Such items are Pippins, are they not?

A. Yes, sir.

Q. And B.B. Bats, they are competing in the market?

A. Yes, sir.

Q. You see substantial numbers of those items sold in Illinois?

A. Yes, sir.

Q. One-cent Baby Ruths and Oh Henrys?

317 A. Yes, sir.

Q. One-cent Butterfingers and one-cent Hershey bars; all these items are sold in large quantities in the state, are they not?

A. I won't say that.

Q. You see them?

A. No reason why, the jobbers buy in small quantities.

Mr. Kolinski: May we have a short recess?

Examiner Royal: We will recess for about ten minutes.

(Thereupon, a brief recess was taken.)

Examiner Royal: We will be in order.

By Mr. Krein:

Q. Mr. Fransworth, the Commission contends here that the elimination of the break-and-takes manufactured by the respondent, Bunte Brothers, and sold in the state of Illinois, the elimination of those break-and-takes would increase the sale of straight candy in Illinois of the interstate manufacturers of candy. Now, assuming a cease and desist order is issued in this state against the respondent and the respondent is prevented from selling in Illinois break-and-takes, it is possible, is it not, for the respondent to either sell a new and different penny item or to press the sales of their regular straight candy in Illinois and recapture any lost volume? Do you understand the question?

318 A. I would like to have it read.

(Record read by the reporter.)

A. Yes.

Q. You say it is possible? From your knowledge of the merchandising methods of the respondent, the manner in which they sell candy and advertise the same, do you think it is probably they would recapture in the event a cease and desist order is issued?

A. Well, as far as my viewpoint, I am always looking for quality. I don't care as far as competition, that doesn't

make any difference to me, any jealousy. Quality is what I am after.

Examiner Royal: That is hardly responsive to the question.

By Mr. Krein:

Q. You said it is possible for the respondent to recapture that lost volume. Now, I ask you from your knowledge of the respondent's merchandising methods, their advertising facilities, do you think, it is probable they actually would recapture the lost volume?

A. If they would discontinue these break-and-takes?

Q. Yes.

A. They would on straight goods?

Q. Yes.

A. Yes.

319 Q. In that event no interstate manufacturer would be benefited by the elimination of the break-and-takes in Illinois by the respondent, isn't that true?

A. Yes.

Mr. Krein: I think that is all.

Redirect Examination by Mr. Kolinski.

Q. If the respondent were to stop the making and selling in Illinois of the break-and-takes as evidenced by the Exhibit just shown you, do you feel that representatives of companies located outside of the state of Illinois would be placed on an equal basis for the straight candy business in the state of Illinois?

A. Yes, sir.

Q. And when you answered partially one of the questions you were interested in quality, did you mean by that you prefer all manufacturers to be confined to the selling of straight candies and not have some selling break-and-takes?

A. Yes, sir.

Q. Is that what you mean?

A. Yes, sir.

Q. So that if the sale of break-and-takes were to cease in the state of Illinois—

A. Yes, sir.

Q. (Continuing)—don't you feel that there would

320 be some advantage to you, representing outside manufacturers seeking to sell straight goods in Illinois?

A. Yes, sir.

Mr. Kolinski: That is all.

Recross Examination by Mr. Krein.

Q. You said break-and-takes did not affect your business. How would you be benefited? Would you explain?

A. They have so much money to spend for sweets. Whether they get five of those for a nickel or five candy bars affects it.

Q. Do you say it affects your business or affects—

A. It affects some, some it does and some it doesn't. I mostly go to wholesale grocers.

Q. You really don't compete in the market in which break-and-takes are sold?

A. As a whole I cover the territory, I call on the jobbers where they are handling that class of merchandise, but I cover more so of the trade where they handle bulk stuff.

Mr. Krein: That is all.

Redirect Examination by Mr. Kolinski.

Q. Is it your observation from your experience in the candy industry that there is a limited amount of funds available for the children to spend for candy?

321 A. Yes, sir.

Q. Your observation of what they spend for break-and-takes is just that much money detracted from what they would spend for straight goods, is that it?

A. That is it.

Mr. Kolinski: That is all.

Examiner Royal: You have no further questions?

Mr. Krein: I don't know. That is all, I guess.

Mr. Kolinski: That is all.

Examiner Royal: You will be excused.

Mr. Kolinski: Have you your subpoena with you?

Examiner Royal: Let me see your subpoena.

The Witness: Yes, sir.

(Witness excused.)

Mr. Kolinski: Let's let the record show Mr. Reuben H. Johnson is called as a witness, also under subpoena. Mr. Johnson resides in a hotel. The subpoena was sent registered to him and we will present it later.

REUBEN H. JOHNSON was thereupon called as a witness on behalf of the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Examiner Royal.

Q. What is your name?
A. Reuben H. Johnson.

322 By Mr. Kolinski:
Q. Where do you reside?
A. 2150 Lincoln Park West.
Q. Chicago, Illinois?
A. Yes, sir.
Q. What business are you in?
A. Candy brokerage.
Q. How long have you been in that business?
A. Since 1930.
Q. What companies do you represent?
A. Wayne Candies, Incorporated, Fort Wayne, Indiana.
Q. Fort Wayne, Indiana?
A. Yes, sir.
Q. What line do they manufacturer?
A. They manufacture a general line ranging from, well, bulk goods, bars and package goods.
Q. And that is sold and distributed in the normal channels of the industry by that company?
A. To department stores, jobbers and syndicates.
Q. And sold to retain confectionery stores located in the state of Illinois?
A. Yes, sir.
Q. In what portion of the state of Illinois do you sell this particular line?
A. I represent them in Cook County only in this state.
323 Q. Did you represent them during the year 1935 and 1936?
A. Yes, sir.
Q. Approximately what volume of business did you do for them during the year 1935?
A. Well, I would say in the neighborhood of about $25,000 a year.
Q. And during the first month of 1936 did it go at that same pace?
A. Yes; even better.
Q. The goods you sell for them here are shipped to Illi-

nois from the point of manufacture at Fort Wayne, Indiana?

A. Yes, sir.

Q. You sell direct to jobbers?

A. Yes, I sell to jobbers and to department stores.

Q. To how many jobbers do you sell in the state of Illinois?

A. I would say approximately 100.

Q. The name of your company is Wayne Candy Company?

A. Wayne Candies—

Q. Incorporated?

A. (Continuing)—Incorporated.

Q. You don't make any sales to retailers?

A. No, sir.

Q. Except the departments stores you have mentioned?

A. That is right.

Q. In the course of your duties do you have occa-
324 sion to visit the retail candy stores?

A. Yes, I do.

Q. And you are generally acquainted with them?

A. I think the main reason why I do that is to keep in touch with what is going on. I may find some new ideas to submit to my firm.

Q. In other words, to keep yourself fit for your duties as a candy broker you keep in touch with the retail distribution of candies as well?

A. I try to do that, yes, sir.

Q. Are you acquainted with a form of distribution of candies called break-and-take assortments as distinguished from straight over the counter sales of candies?

A. Yes, I am fully acquainted with the break-and-take assortments.

Q. They are these deals or pixey draws or break-and-takes?

A. And plain draws.

Q. You have seen such draws in the state of Illinois?

A. Yes.

Q. You saw them in the year 1935?

A. Yes, sir.

Q. About when did you see them in 1935?

A. Well, I thing I saw them each and every month they rolled around, all various numbers. I think there were quite a few companies putting them out at that time.

325 Q. And did they become very prominent in that year?

A. Very prominent.
Q. Very prominent in use?
A. Was that during the NRA?
Q. Yes.
A. They seemed to let up during that time. They seemed to simmer down in volume as I remember it at that time.
Q. Did you notice any change after the NRA ceased?
A. Yes, I did. Then it seemed like a few more came back into it. They seemed to get stronger again.
Q. Have you seen a break-and-take put out by the respondent in this case, by Bunte Brothers, called Ta-Ka Flyer?
A. Yes, sir.
Q. I show you Commission's Exhibits 2-A and 2-B. (Handing exhibits to witness) The sales legend known as exhibit 2-B describes 160 chocolate creams of which 140 are vanilla creams and 20 are orange creams which are to be sold at one cent each. The purchaser who procures one with an orange center receives, in addition, one of the 20 assorted bars. The purchaser of the last of the 160 creams procures a half pound box of candy. You are acquainted with that assortment?
A. Yes, sir.
Q. You have seen it on display in the City of Chicago?
A. Yes, sir, both in the jobbers' establishments and the retailers'.
326 Q. From your experience in selling candy in the state of Illinois particularly during the year 1935 and prior to January 29, 1936, had you noted any effect of the sale of such penny break-and-takes upon the sales of straight goods on sale in this state?
Mr. Krein: I am going to object to this question unless it is referring to his own personal experience, his own business.
Examiner Royal: It will be overruled. I think he asked if he had noted.
Mr. Kolinski: I said from your experience. Read the question.
(Record read by the reporter.)
Mr. Krein: I am going to object to this question on the ground that it doesn't show the witness had sold candy when there were no break-and-takes. I don't see how he could give an opinion or give a statement of fact as to the effect of it on his business.
Mr. Kolinski: The witness has stated he knew about

the NRA period, when they were quiet. He knew when they came out.

Examiner Royal: He seems to have had considerable broad experience. The objection will be overruled.

Mr. Krein: Exception, please.

The Witness: A. Well, you are—

327 Mr. Krein: Pardon me. Is the exception granted?

Examiner Royal: Exception granted.

By Mr. Kolinski:

Q. You understand the question, do you?

A. Pertaining to my own business, Mr. Kolinski, or to the candy business in general?

Q. The candy business in general.

A. While I won't kick, I feel, I am convinced, this is purely my own viewpoint, that draws are definitely detrimental to the legitimate candy sales of penny goods. I feel that it takes away from the legitimate sale of the regular penny goods. Insofar as I am concerned, it didn't affect me because I have no penny goods to sell, but it does, I feel this, that the salesman representing the house that does have break-and-takes has a decided advantage over me. So, therefore, perhaps I am affected in that if another salesman comes along with break-and-takes, naturally the jobbers only being able to buy from a few houses and this man has the break-and-take, he is going to be favored with his other numbers and he does put me at a disadvantage, and I feel if all companies did not have break-and-takes we would all be on an equal footing, and that includes myself.

Q. Now, have you observed that salesmen who carry break-and-take are able to sell more straight goods by virtue of the fact they carry break-and-takes when they call on jobbers?

328 A. I think that is just natural. I think that is a decided advantage.

Q. Do you carry a break-and-take?

A. No, sir.

Q. Have you a personal opinion concerning break-and-takes?

A. I have.

Q. What is it?

A. I think that it has been clearly demonstrated, if I may go out of Chicago, I would like to relate the experience we have had in Milwaukee—

A. I think you had better confine your experience to the sale of break-and-takes as you have observed them in the state of Illinois.

A. All right. Well, the children get so many pennies to buy candy, that I think is granted, and with the break-and-take there is a temptation there for them to try to win something and it is my personal opinion we have no business reaching down into the cradle and starting to make gamblers at such an early date. We will all become maybe affected that way later on and that has convinced me it is a bad thing.

Q. What is the last?

A. That alone has convinced me it isn't a good thing for the candy industry.

Mr. Kolinski: No further questions.

329 *Cross-Examination by Mr. Krein.*

Q. Mr. Johnson, a jobber that really has a call for certain items will carry that item in stock, will he not?

A. Yes, usually.

Q. Regardless of whether that company manufactures break-and-takes or not, isn't that right?

A. Yes, sir.

Q. Regarding the NRA matter, what stores, what places did you go in in order to get an opinion that prior to the NRA there were a certain number of break-and-takes sold and after the NRA there were fewer and after the NRA was repealed, then, a few more came in? What experience did you have? Where did you observe the break-and-takes?

A. Are you speaking from the retail standpoint?

Q. I don't know. Whatever you were speaking of.

A. I was speaking of both.

Q. What jobbers do you have in mind the stock of whom had more break-and-take after the NRA was repealed? Can you name some?

A. I think that would apply generally without getting specific about it. I think that applied to all jobbers who were handling break-and-takes right through.

Q. Are you confining your experience to Illinois right now?

A. I am confining my experience to Chicago. That is all I represent in Illinois.

330 Q. You mean the retail stores that you were in and the jobbers that you called on had more break-and-takes after the NRA was repealed than they had during the NRA?

A. From my observation I would say, yes.

Q. How much more? Substantially more?

A. I would put it that way.

Q. Do you know whether or not manufacturers in Illinois and manufacturers shipping into Illinois observed that provision of the NRA, that is, the confectioner's code against break-and-takes? You would say from your experience you think they did, is that right?

A. Did what?

Q. Observed the provisions of the candy code against break-and-takes?

A. During the NRA I noted that, well, let us say, with no exceptions.

Q. Do you know any company that manufactured break-and-takes prior to the enactment of the NRA that discontinued selling in Illinois break-and-takes during the enforcement of the NRA and prior to its repeal?

A. No, I can't say I do.

Q. Then, your opinion is just from your observations?

A. Observations and acquaintance with the local representatives.

Q. You mean the local representative informed you of the fact?

331 A. Yes, sir.

Q. Which ones? Can you name some?

A. That represented these concerns that had break-and-takes?

Q. Well, representatives that had break-and-takes that discontinued during the NRA?

A. Let's see. Well, I just can't name any of the companies now offhand. A lot of companies in the east that came in here and during the NRA because of the law they became frightened apparently and didn't ship. That is my observation, quite a number of companies that shipped in here from Brooklyn and from Philadelphia and through the east, Boston, that were not shipping in here for quite some time.

Q. But you don't know about the local dealers in Illinois, the local manufacturers in Illinois?

A. Did they continue to ship, is that what you are asking?

Q. That is right.

A. I know one outfit that continued to ship, I mean aside from Bunte, that you have in mind. I mean Holloway Company.

Q. In other words, they were still on the market so any retail store that wanted them could get them?

A. That is right. Holloway had a very big demand and they continued to ship.

Q. In other words, maybe the retail stores that didn't have them did so because they didn't want to carry them, because they could have gotten them if they wanted
332 from the respondent or from Holloway?
A. Yes, sir.
Mr. Krein: I think that is all.

Redirect Examination by Mr. Kolinski.

Q. Are you acquainted with Mr. Poole, the representative of the Ziegler Company?
A. Yes, sir.
Q. And Mr. Flersheim of the Keppel Company?
A. Yes, sir.
Q. Mr. Volk of the Hollywood Company?
A. Yes.
Q. Do you know who represented the Bonita Candy Company of Fond du Lac?
A. A fellow by the name of Hickman.
Q. Do you know whether those companies ceased selling break-and-takes in the state of Illinois during the NRA period?
A. I think they did.
Q. Your general observation from daily contacts with the trade was during the NRA break-and-takes were not as universally sold here as they were sold immediately after the cessation of the NRA in June, 1935?
A. Yes, sir, definitely.
Q. And since that time you have seen many of them in this state?
333 A. Yes, sir.
Q. And you have seen particularly the Bunte Ta-Ka Flyer assortment?
A. Yes, sir.
Mr. Kolinski: That is all.

Recross Examination by Mr. Krein.

Q. Getting down to facts, Mr. Johnson, in your opinion, from your experience in the candy industry, do you think there would be any effect at all by eliminating the respondent from selling break-and-takes if the other companies were manufacturing and selling in Illinois break-and-takes?
A. Do I think it would be any advantage?
Q. To the straight candy industry?

A. Yes, I do. I think more of the pennies that are now going to break-and-takes; if there are many left, would go into the regular channels.

Q. Even if there were other break-and-takes sold in Illinois, I am assuming the respondent is prevented from doing it, but others continue doing it, do you think then there would be any advantage?

A. If the other were permitted to continue?

Q. That is right.

A. Well, yes, I think there would be an advantage for this reason, because no one else has the market that
334 the two in this city I happen to know of.

Q. That is the respondent and Holloway?

A. And the Holloway Candy Company, M. J. Holloway.

Mr. Krein: I think that is all.

Mr. Kolinski: No further questions.

Examiner Royal: The witness will be excused.

(Witness excused.)

Mr. Kolinski: I am calling Mr. Francis A. Heroux.

FRANCIS A. HEROUX was thereupon called as a witness on behalf of the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Examiner Royal.

Q. What is the name?

A. Heroux.

Q. The first name?

A. Francis.

Q. Any middle initial?

A. A.

By Mr. Kolinski:

Q. You were subpoenaed to appear here today, Mr. Heroux?

A. That is right.

Q. Where do you reside?

A. 518 Williams Street, River Forest.

Q. Cook County, Illinois?

335 A. Cook County, Illinois.

Q. What business are you in?

A. Candy business, salesman.

Q. What company do you represent?

A. Switzer Yellow Jacket Company of St. Louis.

Q. Their plant and office are located in St. Louis, Missouri?

A. That is right.

Q. How long have you represented them?

A. The last ten years.

Q. How long have you been engaged in business?

A. Ten years.

Q. Did you represent them during the year 1935 and up to January 29, 1936?

A. Yes.

Q. Approximately what volume of their product did you sell in the State of Illinois only during the year 1935?

A. Oh, perhaps, in the year, twenty to thirty thousand.

Q. And the first month of 1936, approximately?

A. The first month of the year, perhaps seven or eight thousand.

Q. That was the year 1936?

A. Yes.

Q. And that product was shipped to customers located here in the state of Illinois from the company's plant at St. Louis, Missouri?

336 A. That is right.

Q. And what line do they manufacture?

A. Carmels and licorice.

Q. Do they manufacture penny goods?

A. It is all penny goods.

Q. It is all penny goods. And sold by you to jobbers in the state of Illinois?

A. That is right.

Q. To approximately how many jobbers do you sell in the state of Illinois?

A. Oh, perhaps 200.

Q. And the product is sold to jobbers as part of a system of distribution under which it is sold by them to retail confectioners located in the state of Illinois, is that right?

A. That is right.

Q. In the course of your duties as candy broker, do you occasionally visit retail stores and keep in touch with developments in the retail candy business?

A. Yes.

Q. You do that as a matter of professional interest?

A. That is right.

Q. Are you acquainted in the distribution and retail of the candies with the distinction between straight over the counter selling, what we call straight candies, and the

assortments that are known as break-and-takes which
337 have the element of chance in the distribution of the candies?

A. Yes.

Q. I show you, in particular Commission's Exhibits 1 and 2-A and 2-B in this proceeding, representing an assortment called Ta-Ka Flyer assortment and also the assortment called the Summer Bar assortment. In such assortment, as you will note from the legend, there are 160 units called creams to sell at a penny each. Of these creams 20 bear orange centers, which centers can be detected only after breaking the piece. The purchaser who procures one of the centers that is orange colored procures in addition, without paying additional money, one of the 20 bars named as a prize, and the last purchaser of the 160 creams procures a half pound box of candy. That conforms to your general idea of what these products are?

A. Yes.

Q. Have you seen such products on display in jobbers' establishments as well as retail establishments in the state of Illinois?

A. Yes, sir.

Q. And you saw them during the year 1935?

A. 1935? Yes, 1935.

Q. That was the year in which the NRA functioned during the early portion of the year and after, about June 1st, the NRA ceased?

A. Yes.

338 Q. Do you carry a break-and-take?

A. No.

Q. Do you have a personal opinion concerning break-and-takes?

A. You mean—

Q. As to their effect upon the candy industry in general?

A. And how in my opinion it may affect us?

Q. Your own personal opinion.

A. Personal. Well, in this respect, that in my opinion in the store where the kid purchases candy, this type of a package draws the one, two or three pennies that the kid has because of its element of chance over his spending those same pennies for regular merchandise where he gains full value for his penny.

Q. Do you approve of the sale of such chance assortments in the industry?

A. Personally I do not.

Q. For what reason?

A. Well, for the reason that it is an unfair advantage for somebody that can put this package up.

Q. Have you any reason that concerns the welfare of children?

A. As far as the children are concerned they don't get an even break either, the other merchandise they would buy and get full value for their penny.

Q. Is there any other reason as far as the children are concerned?

339 A. The element of chance that is building with them.

Q. Do you think that is detrimental to children?

A. From my experience seeing them in stores, penny stores, why with the merchandise on display, if there is something there with chance it seems lately they want the chance.

Q. The children flock to it?

A. Yes.

Q. You have been selling candy in the state of Illinois for ten years?

A. That is right.

Q. Has it been your experience in the sale of candies within the state of Illinois that the sale of break-and-take assortments in Illinois has an effect upon the sale of straight candies?

A. Oh, it has.

Q. And just what is that effect?

A. Well, I wouldn't—you mean in the amount of dollars and cents?

Q. Yes.

A. Or the matter of volume of business?

Q. Dollars and cents?

A. I wouldn't know what the amount was, but it has a tremendous effect. There is no question about that.

Q. Just how?

A. Well, the sale has gone to this type of merchan-
340 dise rather than to the straight candy.

Q. By that you mean the volume that has gone into the break-and-takes has detracted from the volume that would normally go to the sale of straight goods?

A. In other words, penny draws, I suppose it is, as compared to penny stuff I might sell regularly. The kids have so many pennies to spend. If they spend on the draws they are not spending on the regular other merchandise.

Q. Have you in selling candy in the state of Illinois during the past ten years, and particularly during the

year 1935, noticed that salesmen who sell break-and-takes have an advantage over salesmen who do not sell them?

A. Yes.

Mr. Krein: I object to that unless it is limited to his own experience.

Mr, Kolinski: Read the question.

(Record read by the reporter.)

Examiner Royal: Objection overruled.

Mr. Krein: Exception.

By Mr. Kolinski:

Q. You may answer the question.

A. Yes, I think they have a distinct advantage.

Q. And just what is it?

A. Well, the advantage in that the assortment itself is a seller and it will do business for you. If I could
341 have one in my own line I could draw other business with it.

Q. By that you mean the salesman who sells a break-and-take assortment to a jobber is also, by virtue of that fact, enabled to sell the jobber straight goods that he is selling?

A. Other goods he would want to sell.

Q. You have found that is a determent to you in selling your straight goods for the Switzer Company of Missouri, is that right?

A. Yes.

Q. Have you found in selling candy in the state of Illinois particularly during the year 1935, that you are handicapped by virtue of the fact you were not handling a break-and-take assortment to sell to the trade?

A. Yes.

Q. You have found that?

A. Yes.

Mr. Kolinski: No further questions.

Cross-Examination by Mr. Krein.

Q. What kind of candy does the Switzer Company handle?

A. Carmels and Licorice.

Q. Penny carmels?

A. That is right.

Q. Penny licorice items?

A. That is right.

342 Q. Did the Switzer Company ever sell a break-and-take assortment in Illinois?

A. One attempt at the very first start, I don't know

the date of that, but when the draws first came into being we made one attempt which lasted less than a month and quit. We didn't—

Q. You found you were not able to compete when you did have the break-and-take?

A. We found we couldn't do the things, we couldn't afford to do the thing.

Q. You said in your testimony that if you had a break-and-take you would be able to sell your straight goods?

A. That is right.

Q. Here you had a break-and-take and you were not able to retain it?

A. That is right, but we still felt we didn't want to do it. We didn't want to enter into that type of business.

Q. Was it because it was not profitable or it was not morally right?

A. Personally I wanted them from my angle of it, but Mr. Switzer, who heads the factory, didn't want it. He didn't want to mingle in that type of business.

Q. Again I say was it because he had not shown a profit in handling it, is that right?

A. That I wouldn't know.

343 Q. You don't know the reason he didn't want it?

A. The reason he gave at the time was he didn't want to mingle in that type of business. That is what he told us and he stopped it.

Q. You don't know whether it was because he was not making a profit in it—

Mr. Kolinski: I think the witness has answered that question.

Examiner Royal: I think so.

By Mr. Krein:

Q. Isn't it true, Mr. Heroux, that if a jobber has calls for a certain item from his retailers he is going to carry it in stock whether or not that manufacturer of that item has a break-and-take?

A. The jobber will carry it, yes.

Q. In other words, the jobber will take items that are appealable to the purchasing public whether or not the manufacturer of those items has break-and-takes, isn't that correct?

A. Yes, the jobber would, yes.

Mr. Krein: That is all.

Mr. Kolinski: That is all.

Examiner Royal: The witness is excused.

(Witness excused.)

Mr. Kolinski: May we have a short recess?
Examiner Royal: We will have a short recess.
344 (Thereupon, a brief recess was taken.)
Examiner Royal: We will be in order, now.
Mr. Kolinski: I will call Mr. John M. Finch.

JOHN M. FINCH, was thereupon called as a witness on behalf of the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Examiner Royal.

Q. What is your name?
A. John M. Finch.
Q. And your address?
A. 4054 Congress Street.
Q. Chicago?
A. Yes, sir.
Examiner Royal: All right, proceed.

By Mr. Kolinski:

Q. What business are you in?
A. Candy; salesman for confectionery manufacturing of candy.
Q. What company do you represent?
A. Mason, Au and Magenheimer Confectionery Manufacturing Company.
Q. Where are they located?
A. 22 Henry Street, Brooklyn, New York, the main office.
Q. Do you represent any other candy manufacturers located outside of the state of Illinois?
345 A. No, sir.
Q. Did you represent them during the year 1935?
A. I did.
Q. And the year 1934?
A. Well, I was working in the office then.
Q. But in 1935 you were one of the representatives?
A. I will correct that statement. I didn't start on the street until 1936, but I was working in the office, keeping records, so forth.
Q. How long have you been in the candy industry yourself?
A. Five years.
Q. Since 1932?
A. That is right.
Q. Approximately what volume of the candies of the

Mason, Au and Magenheimer company did you sell in the state of Illinois during the year 1935?

A. Well, in round figures I would say approximately 100,000 boxes.

Q. Translated into terms of dollars that would be how much?

A. Let's see, about $60,000.

Q. And that same rate, annual rate, continued during the year 1936?

A. Well, 1936 showed a slight increase.

Q. And approximately in dollars how much did you sell during the month of January, 1936?

346 A. January, 1936, I think was between six and eight thousand dollars. That is in Chicago alone. I don't know the out of state. We didn't have very much business out of the city.

Q. Your sales are confined to the state of Illinois, including the city of Chicago?

A. Well, my own personal business is in the Chicago area only. We have representatives outside in the state.

Q. In the state?

A. Yes, sir.

Q. And these figures you are giving me relate to business being shipped from the—

A. From the Chicago warehouse.

Q. (Continuing.) —from the Brooklyn plant to the Chicago office for distribution in Illinois?

A. Yes, sir. Of course, you understand from here we also ship to the middle west, but these figures I am giving here are just in Illinois.

Q. Yes, we understand each other. What are your general duties?

A. Well, now, I am salesman and also office manager.

Q. And your plant is located where?

A. Brooklyn.

Q. I mean you personally?

A. 509 West Roosevelt.

Q. The corner of Roosevelt and Canal in the city of Chicago?

347 A. Yes, sir.

Q. You maintain a warehouse there and office?

A. Warehouse and office, yes, sir.

Q. To about how many jobbers do you sell in the state of Illinois?

A. Well, in the state of Illinois I would say around 100. We sell direct.

Q. Do you sell to any retailers?

A. Only to the chain stores like the Woolworth stores, the Kresge stores—

Q. How about department stores?

A. (Continuing.) —the Kress stores. Well, the Fair store we sell to.

Q. Your retail sales are not to small individual units?

A. There are a lot of wholesale sales, but they usually buy direct.

Q. The large retail accounts are with direct accounts?

A. Yes, sir.

Q. In the course of your duties do you occasionally visit retail stores, retail confectionary stores in the city of Chicago?

A. Well, occasionally when I am checking up on missionary work.

Q. That is part of your professional duties to keep in touch with the retail selling movement in the confectionery industry?

348 A. Yes, sir.

Q. Are you familiar with the distinction between straight goods which are over the counter sales and assortment sales, particularly the type known as break-and-take assortments where some candy is assembled and linked with a chance—

A. Yes, sir.

Q. (Continuing.) —known as draw deals, you are familiar with that distinction?

A. Yes.

Q. Are you familiar with what are known as penny break-and-takes?

A. Yes, sir.

Q. I show you Commission's Exhibits 1 and 2-A and 2-B, being box cover and legend for a product of which the respondent sold about 40,000 units during the year 1935 and about 80,000 during the year 1936, called Ta-Ka Flyer. (Handing exhibits to witness.) The assortment consisted of 160 chocolate creams of which number 20 had orange centers that are detected after being broken open. They are to sell at one cent each retail. The purchaser of the cream which has an orange center receives in addition one of 20 bars as a prize, in the case of the Ta-Ka Flyer, and in the case of the Summer Bar assortment, there are 16 prizes, and the last purchaser of the 160 creams in each case receives a half pound box of candy. Are you familiar with that?

349 A. Yes, sir.

Q. And with the general plan of operation?

A. Yes. I have never seen this particular one. I know what they are.

Q. You know this is a break-and-take assortment?

A. Yes, sir.

Q. Do you sell such assortments?

A. We don't have them. We put up straight goods.

Q. Are you personally opposed to the sale of such assortments?

A. Well, personally I am.

Q. What is your reason?

A. I don't think it is well for the children. It teaches them to gamble. I do know, I have been in candy stores in my leisure and I have seen children come in and take these chances, and I know children are given carfare to school and they will thumb rides to school and go in and spend their money for candy and nine times out of ten when they can take chances to get something big for the penny they will do it.

Q. From your observation and personal experience in selling candies in the state of Illinois have you observed the effect of the sale of such break-and-take assortments as evidenced by Commission's Exhibit 1 and 2-A and 2-B here, any effect upon the sale of straight candies in general?

A. I have.

Q. What is that?

350 A. Well, from the retail standpoint you mean?

Q. From the standpoint of the industry as a whole?

A. The industry as a whole? Well, it hurts the regular business. They seem to be more in preference where they are available.

Q. Would you say it detracts from the sale of straight goods?

A. I would say to a certain extent.

Q. Would you say that the volume of assortment candy sold in break-and-take assortments, such as is evidenced by Exhibits 1 and 2-A and 2-B, detracts that much from the volume of all candies that will be sold?

A. I could, yes.

Q. Has that been your observation in this state?

A. Well, from my own experience I believe that in May, of 1935, when these pick-and-take assortments came out stronger, about when the decline of the NRA happened, I experienced a decrease in our net volume of sales in the city of Chicago alone over the month of May, 1934, about three thousand which might be attributed to the fact we didn't have such a thing to offer the jobber.

Q. What month was that?

A. May, of 1935 versus May, of 1934.

Q. You sold 3,000 boxes less in 1935?

A. And the following month, April, we sold ap-
351 proximately 1,000 boxes less.

Q. Of your straight goods?

A. Of our straight goods.

Q. That coincided with the time when there were many break-and-takes being sold in Chicago?

A. That was when they started on the up-grade, got real strong.

Q. Have you ever observed whether salesmen selling break-and-takes have any advantage when they approach jobbers?

A. Well, it seems to be what the jobber is looking for, something that will go the quickest, and naturally a break-and-take is something that will sell quicker by the retailer, naturally that is what he wants.

Q. How does that affect the salesman who is selling only straight candies unaccompanied by a chance assortment?

A. I would say it would cut his sales down because the jobber, the ordinary jobber now, outside of a few, only has so much money they want to invest, outside of some of the bigger supply houses, and when they buy many, many boxes that naturally cuts down on the order of the other goods.

Q. When the jobber purchases break-and-takes such as is evidenced by Exhibits 1, 2-A and 2-B, has it been your observation they will purchase other straight goods from the same salesman that is selling the break-and-take?

A. Oh, they will, yes, naturally.

352 Q. Does it affect the salesman who is not selling the break-and-take assortment?

A. I think it will, because the break-and-take is a natural lever.

Q. There is a demand for it?

A. There is a demand for it.

Mr. Kolinski: That is all.

Cross-Examination by Mr. Krein.

Q. What kinds of candy do you sell for your company?

A. Five-cent bars and penny goods, Coconut Peaks, Mason Mint and Mason Black Crow in both sizes, nickel and penny sizes, also other nickel bars too we have.

Q. I think I must have misunderstood you. I thought you said you worked in the office in 1935 and did selling first in 1936?

A. That is true, but I kept all records and made all

shipments and occasionally when I happened to be visiting downstate I would go out and contact a few jobbers on my own. I had that authority.

Q. It wasn't until 1936 you actually did sell for your company?

A. Actually did sell for the Company, that is right.

Q. During the time the NRA was in effect, did you know of any manufacturer in this area that stopped selling break-and-takes in Illinois?

353 A. Why, I don't know as to that. If there were any sold they were probably sold as separate assortments.

Q. They were sold in Illinois during the NRA, were they not?

A. I rather imagine they were, yes.

Q. In other words, any retail store if it wanted break-and-takes had access to jobbers that handled them?

A. They didn't buy them as a break-and-take. They bought as a box of creams, a box of nickel bars. That is the way they got around the NRA.

Q. The respondent sold break-and-takes in Illinois during the period of the NRA put up as an assortment such as this?

A. Of course, I was not out on the street during the NRA, you understand, but I do know that was the way of getting around the NRA, by not selling as break-and-takes, but as separate items, but it was the understanding that is what they were, break-and-takes.

Q. From your observation you don't know of a single manufacturer that sold break-and-take assortments in Illinois during the time the NRA was in effect?

A. As a break-and-take, no.

Q. During that period did you visit jobbers and retail stores?

A. No, I was working inside at that time.

Q. On what basis did you give your opinion that break-and-takes were sold in greater quantities after the

354 NRA was declared unconstitutional?

A. Well, I noticed from reports of our own men, our own sales that went out and from the information I got from them and I know also in right about that time was when the bars were considered let down and the NRA went out, and anything went.

Q. Isn't it a fact that if jobbers have a demand for certain penny items they will carry those items whether or not the manufacturer of those items manufacture break-and-takes or not?

A. They may carry some, but they may not carry as many and they will push as many as they can make the most money on and what they can sell the largest amount of, the largest volume.

Q. Have you ever heard of B. B. Bats?

A. B. B. Bats? I heard something similar to that. I couldn't say positively I have seen it. There are so many different names it is pretty hard to remember all of them.

Q. Do you contact retail stores and jobbers frequently now?

A. The jobbers, I call on them regularly. The retail stores, well, when we are having campaign work I call on them to check up on our missionary men. Occasionally whenever I drop in to a retail store I naturally look at their candy display.

Q. Have you observed B. B. Bats in any of the stores?

A. I can't say positively I have. I always look out for something in competition with ours, someone that is using our names.

355 Q. You don't consider B. B. Bats in competition with your type of sucker? It is a penny sucker.

A. We put out nothing like that, similar to that. It is something in direct competition, in other words, I look for a coconut bar that will compete with out coconut Peak or a penny mint that will compete with our penny mint. That is what I am watching out for mostly and then I take a general glance at the rest of the line to see what they have, how attractive it is, and so forth.

Mr. Krein: That is all.

Redirect Examination by Mr. Kolinski.

Q. About what size is your penny mint?

A. Well, it is about, I would say an inch and a quarter in diameter.

Q. About what thickness?

A. It is about, oh, about a quarter of an inch thick, maybe three-eighths of an inch. Of course, from time to time we change the size and type of it and thickness.

Q. Do you consider a penny mint one-eighth of an inch in thickness and three-fourths of an inch in diameter a penny's worth?

A. I would not, the size of penny goods today.

Mr. Kolinski: That is all.

Examiner Royal: Is that all, Mr. Krein?

356 Mr. Krein: Yes.

By Mr. Kolinski:

Q. Did you bring your subpoena with you?

A. Yes.

Examiner Royal: The witness may be excused.

(Witness excused.)

Examiner Royal: If you gentlemen are ready to let me know when you want the hearing adjourned to?

Mr. Kolinski: I would like to have the hearing adjourned to Tuesday, July 27, at ten o'clock a. m., central standard time.

Examiner Royal: Let the record show this hearing is adjourned at 12 o'clock noon, central standard time, to be reconvened at 10 a.m. central standard time, Tuesday, July 27, in Room 1123.

(Whereupon, at 12 o'clock noon, central standard time, July 24, 1937, the hearing in the above entitled matter was adjourned.)

359 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—2695) * *

Room 1123 New Post Office Building,
Chicago, Illinois,
Tuesday, July 27, 1937.

Met pursuant to adjournment at 10:00 o'clock a. m.

Before:

Irving D. Royal, Examiner.

Appearances:

P. C. Kolinski, attorney for the Federal Trade Commission.

LeRoy Krein, attorney for the respondent. (105 West Adams Street, Chicago, Illinois.)

360 PROCEEDINGS.

Examiner Royal: We will come to order if you are ready. Let the record show that the hearing in this matter is reconvened at 10:15 o'clock a. m., Central Standard time, July 27, at room 1123 New Post Office Building, Chicago, pursuant to the adjournment taken July 24, 1937, and pursuant to notice and agreement.

Mr. Kolinski: Your Honor, I will call Mr. John T. Poole.

Examiner Royal: Mr. Poole, will you please rise and hold up your hand.

JOHN T. POOLE was thereupon called as a witness on behalf of the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Examiner Royal.

Q. Your name is what?
A. John T. Poole.

By Mr. Kolinski:

Q. Where do you reside?
A. Wilmette.
Q. Illinois?
A. Wilmette, Illinois.
Q. What business are you in?
A. Confectionery salesman.
361 Q. How long have you been in that business?
A. About twenty-five years.
Q. What company do you represent?
A. George Zeigler Company, Milwaukee.
Q. That is Milwaukee, Wisconsin?
A. Milwaukee, Wisconsin.
Q. What line of goods do they manufacture?
A. A general line.
Q. A general line?
A. What is known as a general line in the candy business.
Q. Does that general line include penny items?
A. It does.
Q. About what volume of business do you do annually, or did you do for the years 1935 and 1934?
A. I would say around $100,000 or a little better.
Q. And that comprised goods for which you received orders in the state of Illinois and which goods were shipped from Milwaukee, Wisconsin to your customers in the state of Illinois?
A. Yes.
Q. You are acquainted with the modes of retail selling of candy in the state of Illinois?
A. I think so.
Q. Do you have occasion to see retail stores?

A. Yes.

362 Q. As a part of your professional duties?

A. Yes, sir.

Q. About how many jobbers do you sell in Illinois, approximately?

A. Oh, probably 150 to 200.

Q. Are you familiar with the distinction between the so-called straight goods, which are sales over the counter of candies as distinguished from assortments known as deal assortments, in which candies are assembled for distribution by means of a chance device, known as deal candies?

A. Yes.

Q. Are you familiar with what is known as break-and-take assortments?

A. Yes.

Q. I show you Commission's Exhibit 1 and Exhibits 2-A and 2-B in this case, being a box end and a descriptive legend of the assortment involved in this case known as "Ta-Ka Flyer assortment." In that assortment there are 160 chocolate creams, of which 140 are plain center colors, and twenty have orange-colored centers, which is disclosed by the purchaser after breaking or biting the candy. The purchaser pays one cent for each of the 160 creams. If he receives one with the orange-colored center, he then receives in addition without paying any more money one of the twenty bars specified as part of the assortment; and the purchaser of the last of the 160

363 chocolate creams receives in addition without paying any more money a half pound box of chocolates. Does that conform to the form of break-and-take assortments you are familiar with?

A. Yes.

Q. Your company, the Ziegler Candy Company of Milwaukee, Wisconsin, is under order of the Federal Trade Commission not to sell and ship in interstate commerce break-and-take assortments?

A. I understand so.

Q. During the year 1935 and the year 1936 did your company ship and did you sell break-and-take assortments within the borders of the state of Illinois?

A. To the best of my recollection, we did not.

Q. Do you know whether break-and-take assortments were sold in the Illinois territory during the latter part of the year 1935 and the year 1936?

A. No, I don't.

Q. You don't know that?

A. No.

Q. Do you know whether they are sold here now?

A. You mean ours, Zeigler's?

Q. No, no, other companies'.

A. Oh, yes, yes. I thought you were referring to Ziegler's.

364 Q. No. Will you read the preceding paragraph? (The question was read as above recorded.)

A. Yes. I thought you were referring to Zeigler at that time.

Q. They were sold by other manufacturers in this area?

A. Yes.

Q. And did such sales have any effect on your business?

A. Yes, I would say they did.

Q. And what was that effect?

A. Well, I feel that probably if I had a break-and-take package to sell it would help me sell other items and give me an "in", as I was asked for prizes plenty.

Q. And in percentage of volume or dollars and cents, about what effect did you notice on your business in the early part of the year 1936?

A. Well, I imagine that these "draws" affected my business probably 20 per cent.

Q. You feel that a salesman carrying a break-and-take assortment or draw has an advantage over a salesman who does not carry one?

A. Unquestionably.

Q. What is that advantage?

A. He has an "in" to most penny good buyers that the man without a draw has not got.

Q. And having such an "in," does that enable 365 him to sell additional straight goods?

A. I would say yes.

Q. And the decline in volume that you suffered you trace directly to the presence of break-and-take assortments in the Chicago year during the year 1935 and 1936?

A. In so far as I lost that prize business, yes.

Q. Did you lose any additional straight business because you were not able to carry a draw?

A. Perhaps I did, yes. I imagine I would.

Mr. Kolinski: That is all.

Cross-Examination by Mr. Krein.

Q. Can you name any places, Mr. Poole, that purchased candy from you while you had breaks and takes that did not purchase straight candies from you when you did not have the break-and-take?

A. I could not.

Q. How do you say then it would affect your sales of straight candies?

A. Because they would probably purchase less from me.

Mr. Krein: That is all.

Mr. Kolinski: That is all.

(Witness excused.)

WILLIAM R. BANKS was thereupon called as a witness on behalf of the Commission, and, having been
366 first duly sworn, testified as follows:

Direct Examination by Examiner Royal.

Q. What is your first name, Mr. Banks?

A. William R. Banks.

By Mr. Kolinski:

Q. Where do you live?

A. 3520 Lake Shore Drive, Chicago.

Q. Chicago, Illinois?

A. Yes, sir.

Q. What business are you in?

A. I sell candy.

Q. How long have you been in the candy business?

A. Oh, about thirty years.

Q. About forty years?

A. Thirty.

Q. Thirty years. And you have sold as a salesman representing the manufacturers, is that it?

A. Yes, sir.

Q. What class of trade do you call on?

A. I call on wholesale grocers, wholesale confectioners, chain drugs.

Q. Jobbers.

A. Any wholesale outlet, candy jobbers.

Q. Candy jobbers also?

367 A. Yes, sir.

Q. Except for your sales to retail chains or de-

partment stores, you don't make sales to individual candy retailers?

A. Oh, no.

Q. In the course of your duties as a salesman, you visit retail stores occasionally, do you not?

A. Yes, at times.

Q. What company do you represent?

A. Well, I represent Hollander, Incorporated, of Holland, Michigan. That is my heaviest line.

Q. Do you represent any other line located outside of the state of Illinois?

A. No.

Q. How long have you represented Hollander?

A. Well, I took their line in January, 1936.

Q. Approximately what volume of business annually do you do for them?

A. Last year I did about $125,000.

Q. And that was all sold in the state of Illinois to customers—

A. No, not in Illinois, not all in Illinois.

Q. About what is the volume in Illinois, approximately?

A. Our volume in Illinois was not very heavy last year, I would say—you mean goods shipped in or sold through a Chicago contact?

368 Q. Goods that were sold in Chicago that were shipped into Illinois from Michigan.

A. Oh, I would imagine that we only took about $8,000 out of Illinois.

Q. Are you familiar in connection with the retail selling of candies with the distinction between so-called straight goods through over-the-counter sales and assortment candies accompanied by a chance device known as break-and-take or deals?

A. Yes, sir.

Q. Have you seen such break-and-take assortments on sale in Illinois in the year 1935 and the year 1936 and down to date?

A. Oh, yes.

Q. You have seen them offered for sale by retailers and in jobbers' stocks?

A. Yes.

Q. I show you Commission's Exhibit 1 and Exhibits 2-A and 2-B of this proceeding, being—

A. Do I have to read those? My eyes are pretty bad.

Q. Well, I will describe them to you. This is called the "Ta-Ka Flyer Assortment Bar."

A. Yes.

Q. And contains 160 chocolate creams, 140 vanilla creams, 20 orange creams, 20 assorted bars, and one-half pound box of chocolates.

369 A. Yes.

Q. Now this assortment of 160 chocolate creams are sold to the consumer at one cent each. Of the 160 units 20 units have an orange-colored center which the purch[illegible]r discovers upon breaking it or biting it open. If the [illegible]haser procures one of the orange-colored centers, then without paying any additional money he receives in addition one of the assorted bars. The purchaser of the last of the 160 creams receives in addition without paying any more money the one-half pound box of chocolates.

A. Yes, sir.

Q. Does that conform with the break-and-take assortments you have seen in the Illinois market?

A. The general construction of it about is the same, yes, sir.

Q. Have you an opinion as to the effect of a break-and-take assortment of the character I have just described to you upon the straight candy goods business in general?

A. Do you mean do they sell more readily than straight penny goods?

Q. No, just generally, do you have an opinion as to whether or not they have an effect?

A. I have had a number of jobbers ask me if I had anything of that kind; and I believe that they sell a little more freely or easily, easier than the straight penny
370 candy goods, unless in the straight penny pack you have a very large size and a big value to offer.

Q. Do you have a personal opinion concerning the sale of break-and-take assortments?

A. Well, in what direction?

Q. Either in favor or against them.

A. Well, for the last five years I have had nothing of that kind to sell. However, it has been my experience that where I had items of that kind to sell it would materially increase your volume of sales.

Q. But are you personally opposed to carrying such an item?

A. No, I would not say that because I have sold it at different times, but not within the past four or five years.

Q. Did you find when you sold it that there was an advantage to carrying it?

A. Yes, if I had a good one with a lot of value in it, yes.

Q. And what was that advantage?

A. Well, they bought it more freely than they would buy the straight penny count goods.

Q. And did you find also that it was easier to sell the straight goods that you were carrying with you at that time?

A. Well, oftentimes if you could get an order started with a jobber on some hot item, he will follow through on your other numbers.

Q. And you have found that to be the case in your experience?

371 A. I believe so, yes.

Q. Have you an opinion as to whether the volume of money spent for break-and-take assortments has an effect on the total amount of money spent on all candies?

A. You mean the penny break-and-take?

Q. Yes.

A. Well, I think that the money spent on any type of candy would take that much more money out of circulation to be spent on other types of candy.

Q. So would you say that it detracts from the volume or amount of money available for purchase of straight candies?

A. Yes, I think so.

Q. And the penny break-and-take items if marketed in the candy industry are in direct competition with penny items of straight candies which do not have a chance feature, are they not?

A. Oh, yes.

Mr. Kolinski: That is all.

Cross-Examination by Mr. Krein.

Q. Did you sell any candy in Illinois in the year 1935?

A. I did not sell any in Illinois in the year 1935.

Q. Do you sell in Illinois to jobbers at the present time?

A. Yes.

Q. What items do you sell to jobbers in Illinois?

372 A. I sell chocolate covered cherries in one pound boxes; assorted chocolates in one, three and five-pound boxes.

Q. Do you sell any penny goods to jobbers in Illinois at the present time?

A. No.

Q. Do you handle penny goods at all?

A. I haven't had a penny piece to offer for the last two months.

Q. So the only time you sold penny goods in Illinois was the period of four months beginning with January, 1936, is that right? Oh, you sold all through 1936, penny goods?

A. Yes.

Q. I see. What kind of penny items did you sell?

A. I did not mean to say that I sold penny goods in 1936 in Illinois, because I didn't. I sold just what I told you I sold.

Q. Have you sold any penny goods in Illinois at all?

A. Not in recent years, no.

Q. Do sell bar candy in Illinois?

A. No, I haven't offered any bar candy in Illinois.

Q. Would you say then that—

A. My business is confined in Illinois to packages and bulk.

Q. Would you say then that the candy that you sell in Illinois is not in competition with penny breaks-373 and-takes or with penny goods?

A. Well, it is not a penny item.

Q. Well, it is not sold at the small retail stores where some of the penny goods are sold, are they?

A. Oh, yes, some of the stores that carry penny goods —drug stores carry penny goods and they also sell pound cherries.

Q. Did you ever hear of B. B. Bats?

A. Yes.

Q. Bunte Pippins?

A. Yes.

Q. One cent Baby Ruths?

A. Yes.

Q. One cent Oh Henrys?

A. Yes.

Q. One cent Butterfiners?

A. Yes.

Q. And one cent Hershey bars?

A. Yes.

Q. Those items are now being sold in Illinois, are they not?

A. Yes, I think so. I saw them for sale here.

Q. They are competing in the market against break-and-takes?

A. I would say that they are competitive with the 374 breaks-and-takes. They are items that sell for a penny.

Q. In your opinion, if a manufacturer comes out with an item that is appealable to the purchasing public, won't he be able to place his stocks on the jobbers' shelves?

A. Well, if the salesman gets an order from the jobber, he certainly will.

Q. Won't a jobber give an order to such a manufacturer putting out such a piece of candy?

A. As far as that type of goods goes?

Q. Yes.

A. Oh, surely. You just mentioned some of the heaviest selling items in the country.

Mr. Krein: I think that is all.

Mr. Kolinski: I think that is all, Mr. Banks.

The Witness: All right, thank you.

(Witness excused.)

Mr. Kolinski: I have phoned and I find that the remaining witness is on his way down and will be here any minute.

Examiner Royal: We will take a recess until he comes.

(Whereupon a short recess was taken.)

ADAM LEIB was thereupon called as a witness on behalf of the Commission, and, having been first duly sworn, testified as follows:

375 *Direct Examination by Examiner Royal.*

Q. What is your name, please?

A. Adam Leib.

By Mr. Kolinski:

Q. Where do you reside?

A. 1417 Berteau Avenue.

Q. Chicago, Illinois?

A. Yes, sir.

Q. What business are you in?

A. Well, I am a candy salesman or broker.

Q. How long have you been identified with the candy industry?

A. Since 1904.

Q. What companies do you represent?

A. The Shelby Gum Company of Shelby, Ohio, manu-

facturer of penny gums, and the Spangler Candy Company of Bryan, Ohio. They manufacture bulk goods and bars.

Q. In the year 1935 and the year 1936 approximately what volume in dollars of goods of these two companies did you sell in the state of Illinois?

A. That is, for the year?

Q. For either of those years what was the approximate volume?

A. 1935 was about ten or twelve thousand dollars
376 and in 1936 it was about eight or nine thousand dollars.

Q. And that volume consisted of candies manufactured by these two companies which you sold in the state of Illinois?

A. Yes, sir.

Q. And transmitted the orders to the home office and the goods were shipped from Ohio to your customers in Illinois?

A. Yes, sir, to the jobbers.

Q. About how many jobbers do you sell to in the state of Illinois?

A. Well, there is about twelve,—no, fifteen in Chicago that I sell regular, and on the outside there is about twenty-five.

Q. As a part of your duties in selling candies you are acquainted with the retail distribution of candies also?

A. Well, now, you mean to sell to the retailer?

Q. No, you don't sell to the retailer?

A. No, the jobbers only.

Q. But as a part of your duties in selling the jobbers, you are acquainted with retail selling methods of candy?

A. Yes, sir.

Q. The candies you sell to the jobbers are in turn sold by these jobbers to the retailers?

A. To the retailers, yes, sir, to the retail trade.

Q. You are acquainted with the distinction in the retailing of candies between the so-called straight can-
376½ dies, over-the-counter sales and chance assortments, where there is some element of chance in them?

A. Yes.

Q. You have seen such assortments in the state of Illinois?

A. Oh, yes, on the jobbers' shelves.

Q. On the jobbers' shelves, and during the years 1935 and 1936 you saw them?

A. More in 1936 than in 1935.

Q. I show you Commission's Exhibit 1 and Exhibits 2-A and 2-B in this case, describing the assortment involved in this case, known as Ta-Ka Flyer bar assortment, an assortment consisting of 160 chocolate creams to retail at one cent each. Of those 160 creams twenty are creams with orange centers which the purchaser discovers on breaking it open or biting it open. The purchaser who procures one of the orange colored creams receives in addition without paying any more money one of the assorted bars which are given as prizes. The purchaser of the last of the 160 creams, regardless of its color, receives without paying any more money a half pound box of chocolates.

A. Yes.

Q. Does that conform with the general type of breaks-and-takes that you have seen in Illinois?

A. Yes; yes, it does. There are others, but this
377. is one of the leading ones, I would say. There are several other kinds.

Q. In your selling of candies in the state of Illinois have you observed any effect by the presence and sale on the market of break-and-take assortments such as these exhibits upon straight goods in the candy industry?

A. Yes, it takes business away from straight goods. Naturally, the more of those that are sold the more business it takes away. Not only that, but the child will take more chance and spend more pennies trying to get that kind of stuff than he will on straight goods.

Q. Have you observed whether or not a salesman who sells a break-and-take assortment has an advantage over a salesman who does not sell one?

A. Yes, I think so. I know so, in fact. I have seen it myself personally.

Q. What is that advantage?

A. Well, the jobber works along the line of least resistance, and of course it is easier to sell to a lot of his trade a break-and-take assortment and get in than anything else that he has; easier than if he has a straight line to offer, because there is more inducement there, he can talk to the retailer and influence him by that quicker than he can with most anything else. Naturally he will
buy this break-and-take and always carry it on his
378 truck whenever he can get it.

Q. Have you observed that salesmen who sell jobbers breaks-and-takes are also able to sell their straight goods to such jobber?

A. Yes, but they always try to sell the breaks-and-

takes first, and they get the biggest volume of business from that. Thereafter they sell the straight goods for what is left, what the retailer can buy them for.

Q. But you have observed that selling break-and-take assortments enables the salesman to sell more straight goods than he is handling?

A. Yes.

Q. If he gets an order for that it is the tendency of the jobber to buy as much of the other goods as they can from the one man, is that right?

A. Well, I have noticed this, that in looking over their stocks, going over it with the stockman, the buyer will say, "Well, we will have to take so-and-so and so-and-so from this one man, the man who has the breaks-and-takes, in order to make up an order which would be a good order."

Q. Now, have you any personal opinion as to the effect of the break-and-take assortments on the industry in general?

A. Well, I will tell you it is a bad element, a bad thing for the children. It learns them to get something for nothing, and the first thing you know they will spend 379 really more than what they have got, and I have saw children come into stores and spend money that they didn't have, take it out of the pocketbooks of the parents, or someone, and they go in there and spend it in that way, right on the corner store. I have saw that myself. They are trying to get something for nothing.

Q. Would you say from your experience in selling candy, these two Ohio lines in the state of Illinois, that breaks-and-takes in Illinois, such as evidenced by these exhibits, have had a direct effect on the volume of business you have been able to procure here?

A. Yes, sir.

Q. What has that effect been?

A. Well, I couldn't sell as much goods as if those were not in my opposition all the time.

By Examiner Royal:

Q. Did you say you did not sell as much?

A. Sir?

Q. Did you say you did not sell as much?

A. No, sir.

By Mr. Kolinski:

Q. You feel that if the breaks-and-takes such as evidenced by these exhibits were not on the market you would have no difficulty in getting your share of the business?

A. Yes.

380 Mr. Kolinski: That is all.

Cross-Examination by Mr. Krein.

Q. Have you been a candy salesman or broker since 1904?

A. Yes, sir.

Q. What percentage of these volumes, which you say were $12,000 in 1935 and $8,000 or $9,000 in 1936, was made up of penny gums?

A. About two-thirds of it.

Q. Do you carry any penny goods?

A. No, sir, not outside of the gum, no, sir.

Q. Do you call on retailers?

A. No, sir.

Q. How often have you ever visited retailers?

A. Well, I have friends in the retail business that I go and call on. I will tell you, if you will allow me, when I first went into the candy industry I introduced the goods by calling on the retail trade. I don't suppose that makes any difference here.

Q. That was away back?

A. That was away back, yes, sir. That was when I first started. But for the last years I haven't called on the retail trade, only occasionally to find out how such pieces were selling against what I carry, see.

Q. Do your companies advertise in Illinois?

381 A. No, sir.

Q. Do you know any person who purchased a straight candy, together with breaks-and-takes, when that person would not have purchased straight candy otherwise?

A. Well, you mean the jobber?

Q. I mean anybody.

A. Anybody?

Q. Do you know anybody that gave an order for breaks and takes together with straight candy when they would not have given the order for straight candy otherwise?

A. Well, I think I have saw that in the jobbers' places where I visited.

Q. How could you tell from observing in the jobbers' establishments whether or not the jobber would have bought the straight candy otherwise?

A. Because it is necessary to buy so much to make a certain amount to make up a delivery, and they bought

this other stuff in order to make up the amount so that they would not have to pay any cartage on the bill.

Q. You are speaking of persons buying from jobbers?

A. From the manufacturers.

Q. Jobbers buying from the manufacturers?

A. Yes, sir.

Q. We are speaking now of local manufacturers; do you know of any Illinois manufacturer that charges cartage?

382 A. I don't believe I do, but unless—they won't ship him unless he buys a certain amount. He has to buy over 100 pounds, see, in a shipment.

Q. Will you name an Illinois manufacturer to your knowledge that requires a 100 pound shipment before they would ship it?

A. They all do.

Q. In your opinion if a manufacturer puts out an item that is appealable to the purchasing public, whether or not that manufacturer puts out a break-and-take, won't that manufacturer be able to sell that product to jobbers in the state?

A. Will you repeat that question?

Mr. Krein: Read the question.

(Question read as above recorded.)

A. Why, yes, sure, he will.

Mr. Krein: That is all.

Mr. Kolinski: That is all.

Examiner Royal: You are excused.

(Witness excused.)

Examiner Royal: Have you any more witnesses?

Mr. Kolinski: No more witnesses at this time. I would like to have the hearing adjourned until 2:00 p. m. Central Standard time, which will be 3:00 p. m. Chicago time.

Examiner Royal: Today?

383 Mr. Kolinski: Today.

Examiner Royal: Let the record show that the hearing will be adjourned until two o'clock p. m. today, Central Standard time.

(Whereupon, at 11:30 a. m., Standard time, a recess was taken until 2:00 o'clock p. m. Standard time of the same day.)

Afternoon Session.

(The recess having expired, the hearing in the above entitled matter was reconvened at 2:00 o'clock p. m., Central Standard time of the same day, and further proceedings were had therein as follows:)

Examiner Royal: The hearing in the above entitled matter is reconvened at 2:15 o'clock p. m., Central Standard time, July 27th, pursuant to adjournment.

Mr. Kolinski: I will call Mr. John Baumgardt as a witness.

Examiner Royal: Will you rise, please.

JOHN BAUMGARDT was thereupon called as a witness on behalf of the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Kolinski.

Q. Your name is John Baumgardt?
384 A. Yes, sir.
Q. Where do you reside, Mr. Baumgardt?
A. 801 North Harvey Avenue, Oak Park.
Q. That is in Cook County, state of Illinois?
A. Yes.
Q. What business are you in?
A. Light groceries and candy and ice cream.
Q. You are a retailer of candies?
A. Yes, sir.
Q. Is your store located in a residence neighborhood?
A. Yes.
Q. Are children patrons of your store?
A. Yes, lots of them.
Q. How long have you been in that business?
A. You mean altogether in my life?
Q. How many years?
A. Or this place?
Q. How many years in that type of business?
A. Thirty or thirty-five years.
Q. And this particular location?
A. This will be three years in August.
Q. Three years in August?
A. The 20th of August.
Q. During that time you have been selling candies at that store?

385 A. Yes, sir.

Q. Are you acquainted with the distinction between straight candies sold over the counter by weight and price and assortments that have a chance element in them, called deal candies?

A. Yes.

Q. And you are familiar with assortments which are called breaks-and-takes?

A. Yes, sir.

Q. I will show you Commission's Exhibit 1 and Commission's Exhibits 2-A and 2B in this case. Exhibit 1 is Summer Bar Assortment, and Exhibits 2-A and 2-B are Ta-Ka Flyer Bar Assortment.

A. Yes.

Q. Have you seen that assortment?

A. Yes.

Q. Do you sell such an assortment?

A. Yes.

Q. How long have you sold such assortments?

A. I will say during the three years I am over there.

Q. And you know how the assortment operates?

A. Well, when they get an orange-colored cream inside, orange-colored inside, they get a prize, what they call a prize, maybe three or four little pieces of candy in a package. I would say maybe it was worth two
386 cents, supposed to be a nickel package.

Mr. Krein: I object to that last statement, "supposed to be a nickel package." There is nothing to indicate that it is supposed to be a nickel package.

Examiner Royal: Objection overruled.

Mr. Krein: Exception.

By Mr. Kolinski:

Q. There are 160 chocolate creams in that package?

A. Yes, sir.

Q. Of them, twenty have the orange centers?

A. Yes, sir.

Q. And they are accompanied by the twenty assorted bars?

A. Yes, sir.

Q. The purchaser of the last cream receives what for his money?

A. Supposed to be half a pound box of candy.

Q. And that is the way you sell this assortment in your store?

A. Yes, sir.

Q. And it is manufactured by what company?

A. Bunte.
Q. Bunte Brothers, Incorporated, of Chicago?
A. Yes.
Q. Do you sell many of such assortments?
A. You mean of different kinds?
387 Q. No, of this Bunte assortment.
A. No, that is the only one I have of theirs.
Q. Yes, but of that assortment of Bunte's, do you sell many units, many boxes?
A. Oh, probably two or three a week that way.
Q. And are many sales made to children?
A. All children.
Q. All children?
A. Yes.
Q. The children patronage the penny trade, so to speak?
A. Yes.
Q. You purchase these assortments from jobbers?
A. Yes, sir.
Q. When you purchase the assortments from jobbers, do you also purchase straight candies from them?
A. Yes, sir.
Q. Can you tell us whether it is the habit of retailers located as you are to combine their orders in one order as much as possible?
A. Yes, we would sooner buy from one rather than have many coming around.
Q. Why is that?
A. It is less work and less bother.
Q. Less bookkeeping?
A. Yes, sir.
388 Q. You prefer to have it on as few bills as possible?
A. Yes, sir.
Q. So when you purchase draw candy, break-and-takes, whether it is the Bunte product or any other product, you also purchase straight candies from your jobber?
A. Yes, sir.
Q. By "straight," I mean other bulk candy, penny goods, which do not have a break-and-take assortment.
A. Yes, sir.
Q. Caramels and things of that kind.
A. Yes, sir.
Q. Have you any personal opinion on these break-and-take assortments?

A. In the first place, I think it is a bad habit for children to get into. It is a bad habit for children. I think it is harmful. I have always looked at it in that way, but I have to have it because competition compels me to. If I did not have it, they would go to some neighbor and get it from him.

Q. You have competitors located near your store which carry the break-and-take assortments?

A. Yes, sir.

Q. There is a demand on the part of the children for such merchandise, is there?

A. Yes, they ask us for candy which they want.

389 Q. Do you feel if you did not carry the break-and-take assortments you would lose business?

A. I don't think I would. They would spend their money for candy just the same. If I did lose, I would rather lose than to get them into the bad habit of gambling.

Q. If your competitors did not have them, you would be willing to give them up?

A. I could do that, of course, right now, but, as I say, it drives business over to his place, so naturally I would have to keep it up or I would drive my trade away.

Q. You have to keep these breaks-and-takes in stock and on display because of that kind of competition?

A. Yes, sir.

Q. And because you want to hold your trade?

A. Yes, that is it. If I didn't have any competition I wouldn't have them.

Q. In selling that break-and-take assortment, how do you display it in your store?

A. I don't hardly display them at all. I put them on the shelf, I don't keep that in the case. I only give it to them when they ask for it.

Q. And the children seem to be educated to knowing what to ask for?

A. Yes, they are.

Q. You find as a fact that they come in and ask

390 for a chance, the break-and-take assortment?

A. Yes. We never display those items.

Mr. Kolinski: You may cross examine.

Cross-Examination by Mr. Krein.

Q. Do you carry any other types of break-and-take assortments except those manufactured by Bunte?

A. Yes.

Q. How long have you carried other types of breaks-and-takes?

A. All the same time, as long as I am there.

Q. How many types of break-and-take assortments do you carry in your store?

A. I think three.

Q. Do you get them all from the same jobber?

A. Yes—I have two jobbers, of course.

Q. Do your competitors carry the same breaks-and-takes that you do?

A. That I don't know.

Q. You know they carry them though?

A. Yes.

Q. You say the Ta-Ka Flyer bar assortment is one break-and-take assortment you purchase from the respondent Bunte Brothers?

A. Yes, sir.

391 Q. The twenty assorted bars which are the prize packages in this assortment consist of three penny pieces of chocolate candy, do they not, wrapped in celophane?

A. Not all of them.

Q. Some of them are packages of other types of penny candies?

A. Yes, sir.

Q. Do you carry the same type of penny candy as that which is given away as prizes as straight candy?

A. Do you mean do we sell your candy straight the same as in the prize boxes?

Q. Yes.

A. No, I don't think I would.

Q. Outside of the box of Tartines that are given as prizes, which are a retail five-cent package, none of the other packages are five-cent retail packages, are they?

A. I don't know of any, the Tartines is the only one, I believe.

Q. There is no representation in this assortment that those prizes are a five-cent value, is there?

A. You mean, does it say—

Q. Is there any representation that the prizes given are a five-cent value?

A. No, but the children think they are getting a nickel's worth when they win them. When they get
392 a draw, they think they are getting a nickel's worth.

Q. One of the prize packages consists of a bar in this assortment?

A. Yes, they have bars in there.

Q. Small nougat pieces, are they not?

A. Yes, sir.

Q. There is no representation that they are a five-cent value, though, is there?

A. It does not say that, no.

Q. You say you use two or three boxes a week of the Ta-Ka Flyer assortment?

A. No, I mean with the others.

Q. How many of these assortments do you buy?

A. Oh, maybe two a week.

Q. You use two of the Ta-Ka Flyer bar assortment boxes a week?

A. Yes, I think I do. Of course, it never is the same; some days you may use more of one than the other, it just depends on what the children come and buy.

Mr. Krein: That is all.

Redirect Examination by Mr. Kolinski.

Q. Referring to Exhibit 1, that is known as Summer Bar assortment, of 100 units, rather, 160 units, caramels, and there are sixteen prizes in that case. There is
393 a variation—

A. It says sixteen five-cent bars.

Q. Yes. There is a variation in the type of assortment gotten out according to the winter or summer season, is there not?

A. Yes, sir.

Q. And at this time are you selling what is known as the Summer-Bar Assortment, as evidenced by Exhibit 1?

A. Yes, sir.

Q. Now, how many prizes does this assortment you are now selling carry?

A. It says here sixteen and one 25-cent box of candy.

Q. Is that the one that you are selling now? Does it carry sixteen or does it carry twenty prizes?

A. I haven't looked at the boxes, but if this is the assortment, it would be sixteen and one.

Q. This legend here refers to an assortment that was sold in the summers of 1935 and 1936. Did you handle summer assortments during those years?

A. I believe I did, because the candy men generally bring in everything in season.

Q. You recognize the legend that I show you. Exhibit 1, do you not?

A. Yes, it looks very familiar to me.

Q. Now, the Bunte people manufacture and sell a one-cent penny item of a chocolate mold character, 394 little Indian heads or locomotives or automobiles.

A. I haven't had them.

Q. You haven't had them?

A. I have just the little Indian—like Indian dolls, if that is the one you are referring to.

Q. How much does that sell for?

A. Three for a cent.

Q. Three for a cent?

A. Yes.

Q. Are any of those dolls packed in among the sixteen or twenty prizes?

A. No.

Q. They are not?

A. No.

Q. The only one of the Ta-Ka Flyer bar assortment that you know definitely to be a five-cent package is the Tartine package?

A. Yes.

Q. The others, to your knowledge, are not five-cent items?

A. No, I don't think so.

Q. You have no other five cent items from the Bunte Company that compares with the Tartine in the Ta-Ka Flyer bar assortment, which sells for five cents?

A. No.

Mr. Kolinski: That is all.

(Witness excused.)

395 WALTER CALHOUN, was thereupon called as a witness on behalf of the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Examiner Royal.

Q. Your name is—

A. Calhoun.

Q. Your initials?

A. Walter.

Examiner Royal: Proceed.

By Mr. Kolinski:

Q. Where do you reside?
A. At 227 Harrison Street, Oak Park.
Q. Is that in Cook County, state of Illinois?
A. Yes, sir.
Q. What business are you in?
A. Jobbing confectionery.
Q. How long have you been in that business?
A. Since 1921.
Q. Continuously?
A. Continuously.
Q. And you call on the retail trade?
A. Retail trade.
Q. About how many retail accounts do you serve?
A. Oh, I imagine I make an average of, oh, say,
396 fifteen or twenty shops a day, sometimes more.
Q. They are located in Cook County, those shops?
A. Yes.
Q. And you sell a general line of candy?
A. Candy, yes, sir.
Q. Do you sell any candy manufactured by the respondent, Bunte Brothers, Incorporated?
A. I do, yes, sure.
Q. What other candies do you sell?
A. I sell Tangoes, Malteasers, Tartines and their penny line.
Q. In their penny line do you sell any items that are known as chance assortments, break-and-take assortments?
A. Ta-Ka Flyer and Summer Bar Assortments.
Q. I show you Commission's Exhibit 1 in this case and Commission's Exhibits 2-A and 2-B. Do you identify those as a box end and legends respectively of the items that you have just mentioned?
A. Yes. This is the Ta-Ka Flyer and this is the Summer Bar Assortment. (Indicating.)
Q. Exhibit 1 is the Summer Bar Assortment?
A. Yes, sir.
Q. It is true that they modify the assortments somewhat according to the season?
A. Yes.
397 Q. The goods in the Ta-Ka Flyer assortment are appropriate to what season of the year?
A. Well, I would say the fall and winter. It runs up to just before the hot weather comes on.
Q. And the Summer Bar assortment?
A. That is during the summer.

Q. And there is some difference in the character of the candy as well as the prizes?

A. Oh, yes.

Q. Tell us what those differences are?

A. Well, this here Summer Bar has a summer variety of candy in there. It is orange slices and Walnettos—well, they don't call theirs Walnettos; and there is a butter-scotch in there, and there is a kind of a caramel twirl, I think they call them Chews-Chews.

Q. Now, the prizes contained in the Summer Bar assortment, are they of the value of five cents?

A. Not in the Summer Bar assortment that we have now.

Q. And what are some of the variations that you have noticed?

A. Well, that orange slice in there, I think there is only three slices in that package. The butter scotch, it seems to me when I measured it up it was about a third of the size of their five-cent butterscotch.

Q. And the orange slice should contain how many slices?

398 A. Well, we have orange slices that we sell which has got about six or nine pieces in them.

Q. Who are they manufactured by?

A. Well, Chuckles, I think, makes one and Green Brothers. That is all that I think of that make one.

Q. Does Bunte make one?

A. I think Bunte does, but they are not round orange slices, it is folded in to resemble a half orange.

Q. Does Bunte make up a butterscotch caramel and a plain caramel in a five cent package?

A. Yes, it has a butterscotch which is similar to the Walnetto and Honeyscotch.

Q. How does the straight five-cent package of Bunte compare with similar prizes in the Summer Bar assortment?

A. If I remember right, I think they are about a third of the size; that is, if you hold them up against the other package, maybe a little more.

Q. By that you mean that the prizes offered in the Summer Bar assortment, reputedly at five cents, are smaller than the same package in straight goods offered by the same manufacturer?

A. Yes.

Q. Do some of the prizes in either assortment consists of molds, that is, chocolate Indians, chocolate trains, and so forth?

399 A. That was in the Ta-Ka Flyer. That was in the one we had in the winter time.

Q. And the prize packages contained how many such molds?

A. Well, the prize was a box of chocolates.

Q. Yes, but I mean one of the twenty prizes.

A. That was that other draw that they had that had the big chocolate mold in.

Q. In the draw package called the Ta-Ka Flyer bar assortment, among the twenty packages called assorted bars, was there a package containing molded locomotives, automobiles, Indians, and so forth?

A. No, I don't recall that. There were some molded cats in there, I think, or something like that.

Q. Were the twenty prizes offered on that Ta-Ka Flyer assortment of the value of five cents each?

Mr. Krein: I object to his putting into the record anything about the value of five cents each. Nothing was said that the prizes in the Ta-Ka Flyer assortment were reputed to be five cents each. That is already in the record.

Mr. Kolinski: We have a legend here—

Mr. Krein: Not on the Ta-Ka Flyer, it does not say five cents.

Mr. Kolinski: No, it does not say that.

Mr. Krein: Then what are you asking the witness
400 for? We did not say that they were worth five cents.

Examiner Royal: Read the question.

(Question read as above recorded.)

Examiner Royal: I presume you mean, did they have a retail value of five cents?

Mr. Krein: That is right.

Mr. Kolinski: Yes.

Examiner Royal: I think the witness should be competent to answer that question, and the objection is overruled.

Mr. Krein: It is immaterial.

Mr. Kolinski: We have gone thoroughly into the question.

Mr. Krein: We have gone thoroughly into that.

By Mr. Kolinski:

Q. Do you know? Will you answer the question?

A. Well, I would not—I could not remember that.

Q. Now, do you remember the individual units of the 160 chocolate creams in the Ta-Ka Flyer bar assortment?

A. Yes.

Q. Would you say that the individual 160 chocolate creams were worth at retail one cent?

A. No, I would not say that they were, that there was a penny value there.

Q. Do you have any basis for comparing that with
401 a similar product made by the Bunte Company?

A. Yes, their Big Mint. Their Big Mint is about three times the size of that little penny thing that is in there.

Q. In other words, the respondent in this case puts out a penny item known as a penny mint?

A. Yes, a penny peppermint.

Q. It is a peppermint candy?

A. Yes.

Q. And three times the size of the individual 160 mints in the Ta-Ka-Flyer?

A. Yes, I would say so. I would say it would take about three of those to make one of the regular mints.

Q. Now do you see the Summer Bar assortment and the Ta-Ka Flyer bar assortment in retail places that you call on?

A. Oh, yes, sure.

Q. How frequently?

A. Well, pretty near all I am in, school stores and delicatessens both.

Q. What do you mean by school stores?

A. Well, stores near schools, that is what I call school stores. They are delicatessens, but we call them school stores. They are located near schools, and they do business with the school kids, where the neighborhood store gets the neighborhood business.

Q. Have you observed in the course of your busi-
402 ness as a jobber covering this territory whether such break-and-take assortments as evidenced by Exhibits 1, 2-A and 2-B, have an effect upon the sale of straight candy generally?

A. Well, I have always thought that way, that these draws took away legitimate candy business. I have always felt that way, but, of course, I attempt to sell them because my competitors sell them, and if I didn't I will just lose the business, that is all.

Q. And have you found in selling your candies that it has any effect on the sale of straight candies that you carry?

A. Well, naturally, if a kid has five or ten cents to spend, and he spends it on these draws, it affects the other candy.

Q. Referring to your selling to your retail customers, when you approach them to make a sale, is it of advan-

tage to you to be able to sell a break-and-take assortment such as evidenced by the exhibits here?

A. You mean in order to get the other business?

Q. Yes.

A. Well, I very seldom mention these break-and-take assortments unless I have to, unless they approach me on it, when I walk in.

Q. Do you find it to your advantage, do you find it to be an advantage to carry them?

A. I have found it to be, yes.

403 Q. Do you find a demand for them?

A. Sure.

Q. Does it enable you to sell more straight goods because you carry them?

A. Well, no, I don't think so. I think if I went to some of these stores which have only so much to spend, and they buy a couple of draws, you are through. The average retailer has only three, four or five dollars to spend on the candy man, when he goes in there, and if he takes a couple of draws then you are out of luck on the other goods you take in.

Q. You feel that is so much money detracted from what would otherwise be spent for straight candies?

A. Yes, sure.

Q. Do you find any retailers among your customer accounts who are able to buy a rather full line of candies and give you orders for straight goods along with the orders for such break-and-take assortments?

A. Yes, I do, and I have some retailers who don't buy them at all, they buy nothing but straight.

Q. Now, have you a personal opinion concerning these break-and-take assortments?

A. Personally, I am opposed to them. I have always been opposed to any sort of break-and-take assortment, punch cards, and so forth. I would just as soon see
404 one of the old-fashioned slot machines where you drop a penny in with a pin, and let the penny run around where you might get a dime's worth, a quarter's worth or a nickel's worth.

Q. What is your reason for being opposed to them?

A. Well, I think it is gambling.

Mr. Kolinski: You may cross examine.

Cross-Examination by Mr. Krein.

Q. Does the Summer Bar assortment that you are now carrying bear the same legend, "Sixteen assorted bars"?

A. That I couldn't say, I haven't counted them.

Q. You say in your opinion the prizes in the summer assortment are not of the retail value of five cents.

A. I am positive. I would not pay that for one of them if I saw a package of their butterscotch sitting on the counter.

Q. You say the same type of candy that Bunte sells is in the smaller packages in the Summer Bar assortment as prizes?

A. Yes, the last one we had was that way.

Q. As well as carrying prizes, you also carry straight candy?

A. Yes.

Q. And people seeing a similar package of butterscotch would not think it was a five-cent package of butterscotch, would they?

405 A. He would naturally know it was not a five-cent package of butterscotch.

Q. You don't know if the assortment you are using now says five-cent assorted bars or not?

A. No, I don't.

Mr. Krein: That is all.

Mr. Kolinski: That is all, Mr. Calhoun.

(Witness excused.)

G. W. GERBERICH, was thereupon called as a witness on behalf of the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Kolinski.

Q. What is your name?

A. G. W. Gerberich.

Q. Where do you reside, Mr. Gerberich?

A. 527 Highland Avenue, Oak Park.

Q. That is in Cook County, state of Illinois?

A. Yes, sir.

Q. What business are you in?

A. Candy business, jobbing candy.

Q. How long have you been jobbing candies?

A. Going on thirty-one years.

Q. Has that been continuously in the same locality?

A. Well, I have lived in Chicago, then I moved to

406 Oak Park, but it has been on the west side for almost thirty-one years, will be the 10th of February.

Q. You sell to retailers?

A. Yes, sir.

Q. How many accounts do you sell to, approximately?
A. Well, at the present time I have about sixty accounts.
Q. How frequently do you call on them?
A. On an average of once or twice a week, some once, some twice a week.
Q. Where are they located generally?
A. Mostly on the westside.
Q. Are they in residential districts?
A. Oh, yes.
Q. Are there any stores in that list which would be known as school stores?
A. Yes, sir.
Q. By that is meant stores located in the neighborhood of a school?
A. Right around the school, either across the street or the next corner, or something like that.
Q. And they carry a small line of stationery, school supplies, and so forth, as well as candies?
A. Yes, sir.
Q. You have a number of such stores among your customers?
A. I have.
407 Q. Are your retail accounts located in residence neighborhoods generally where children live?
A. Most of them.
Q. Most of the retail accounts which you sell are stores which are patronized by children of the neighborhood?
A. By the children.
Q. What types of candy do you sell these stores?
A. All kinds, penny goods, nickel goods, penny prizes.
Q. By penny prizes you mean assortments of candy connected with a chance feature as distinguished from straight candies which are sold over the counter, so much per so many pounds or ounces?
A. Yes, sir.
Q. Are you familiar with the break-and-take penny assortment manufactured by Bunte Brothers, Incorporated of this city?
A. I am.
Q. Do you know the name of it?
A. Well, they have one they have got now which they call their Summer Draw, if I ain't mistaken, I think that is the name of it.
Q. I will show you Commission's Exhibit 1 in this proceeding, being a legend—

A. That is the one, the Summer Bar Assortment.

Q. That was used by the respondent in the last two years?

408 A. In fact, it is the one I have got today.

Q. This was used by the respondent in the year 1936, containing 160 carmels?

A. Yes, sir.

Q. Sixteen chocolate caramels, sixteen five-cent bar prizes, and the last purchaser received in addition to the one-cent caramel a 25 cent box of candy.

A. Yes, sir.

Q. You recognize that?

A. Of course, some of them vary in different amounts, in the winners; in some there may be twenty winners instead of sixteen.

Q. Do you know whether the Summer Bar assortment gotten out by Bunte Brothers this year carries sixteen or twenty prizes?

A. I wouldn't want to say positively. I think it is twenty. I would not want to commit myself, you understand. I am under oath.

Q. Yes. I will show you Exhibits 2-A and 2-B.

A. Yes, that is the Ta-Ka Flyer.

Q. That Ta-Ka Flyer is sold during what portion of the year?

A. During the winter time.

Q. There is a difference in the candies packed in these assortments to meet the season changes?

409 A. To meet the season changes, that is correct.

Q. And the Ta-Ka Flyer is more adaptable to the cold months of the year?

A. Yes, sir.

Q. Do you find a demand among your retailers for that type of assortment?

A. Yes, it means competition. If I go into my store and if I haven't got any prize, they will say, "Mr. Gerberich, if I can't get it from you I will have to call another jobber." Of course, that means that he will probably sell him something else and that means I am out that much. I am forced to handle it, naturally, to keep my business. I have to carry it for that purpose.

Q. And you carry them and sell them to such of your trade as ask for them?

A. Yes, sir.

Q. Do you sell many of them to your trade?

A. Right at the present time I am not selling very much, I haven't got much business left as far as the small stores are concerned.

Q. During the winter months do you sell many?

A. Oh, yes, we sell probably—well, I suppose I am selling on the average of five boxes a week; in the winter time I would sell ten.

Q. Of the break-and-take assortments?

410 A. Yes.

Q. And the Ta-Ka Flyer assortments, how many of those would you sell a week during the winter months?

A. Probably average ten boxes, probably fifteen, but on an average ten.

Q. They would be sold to the neighborhood stores, a large portion of your retail accounts?

A. Yes.

Q. Do you see them frequently in the stores?

A. Every store I go into, it makes no difference whether I sell them or not. You can go into any store and see them.

Q. In the course of your work and duties as a jobber, have you observed whether the sale of such break-and-take assortments has any effect upon the sale of straight candy in general in the state of Illinois?

A. Well, now, this is my viewpoint; when a child comes in, of course, it seems they have all got the instinct a little bit to gamble; but if he didn't have that prize there to spend his money on, he would buy other candy. He would not walk out without spending that penny. Now, just for illustration, there is a caramel that came on the market within the last few weeks—

Q. That is all right.

A. Of course, that has nothing to do with this case.

Q. No. Would you say that the sale of break-and-

411 take assortments in the state of Illinois, as you have observed it, detracts from the amount of money which would normally be spent on straight candies?

A. Well, I don't know as it would, because I think if the break-and-takes were not there the amount of candy sold would be just the same in dollars and cents.

Q. But the breaks that are now sold, do they in any way take away from what would otherwise be sold as straight candies?

A. Oh, yes, yes.

Q. Have you observed whether it is any advantage to you as a jobber to carry such a break-and-take assortment?

A. Not if they were all off the market.

Q. Being on the market, by virtue of that competition,

have you found that there is an advantage in carrying them?

A. Yes, it is an advantage to carry them.

Q. Has it led to the sale of other straight goods which you carry?

A. Yes, it has, but not to a great extent.

Q. But it does add some to the sale of the other goods that you carry?

A. Yes, because if I went into a store, and they asked me, "Mr. Gerberich, have you any break-and-take or prizes?" and I say, "I am sorry, I haven't got any," I might sell them something else, you understand, but
412 they would naturally call in one of my competitors who would sell them other stuff while he was in there. The merchant would probably say, "Better bring in a box of caramels too." But if the breaks-and-takes were off the market completely, I think it would be wonderful for the candy business in general and for the morals of the children.

Mr. Kolinski: You may cross-examine.

Cross-Examination by Mr. Krein.

Q. You say you have about sixty accounts and you make those accounts about once or twice a week. You say you call on the retailers and make from sixty to 120 stops a week?

A. Yes.

Q. And you sell five boxes of the break-and-take assortments; in the winter time you sell from ten to fifteen.

A. Yes.

Q. It does not seem to be a substantial part of your business.

A. Well, I haven't got very many small stores that sell this kind of merchandise.

Q. Are all of these sixty accounts retail stores?

A. I have a few cafeterias in there.

Mr. Krein: That is all.

Redirect Examination by Mr. Kolinski.

413 Q. The rate at which a retailer disposes of a box of such break-and-take assortments as the Summer Bar assortment or the Ta-Ka Flyer assortment, that varies, doesn't it?

A. Oh, yes, it varies.

Q. And they will move slow in places and faster in others?

A. They will move slow in some places and faster in others.

Q. Can you give us any idea of the amount of time it will run, as you recall, among your customers?

A. Well, as a general rule, especially around a school, they will use on an average of two boxes a week.

Q. When they are slow how long will it take?

A. In this season of the year now, when there is no school, those stores are doing very little business.

Q. How long will such a break-and-take assortment stand in stock?

A. Probably two or three weeks.

Mr. Kolinski: That is all.

Examiner Royal: You are excused.

(Witness excused.)

Mr. Kolinski: Mr. Examiner, I respectfully ask that this hearing be now adjourned in this case to St. Louis, Missouri, on October 2, 1937, at 9:00 a. m. The reason for that is that witnesses will not be available before that particular date, and I am sure that the examination of the witnesses, so far as adducing testimony for
414 the Commission is concerned, will be concluded within one-half day at St. Louis. There will be four or five witnesses subpoenaed for that day.

Examiner Royal: Is that date agreeable to you?

Mr. Krein: No, your Honor. If your Honor please, this case involves the question of whether or not the respondent can ship break-and-take assortments in Illinois. The respondent is domiciled in Illinois. The respondent objects to any hearing held outside of Illinois for the reason that the respondent feels that the Federal Trade Act requires hearings held in reasonable places; and under the circumstances, under the facts of the complaint and the issues in this case, respondent feels that if the attorney for the Commission wants witnesses to testify, the Federal Trade Commission Act authorizes the issuance of subpoenas for them. Not only would it entail respondent's counsels fees if a hearing was held in St. Louis, but by the nature of the case Mr. Bunte himself has attended practically all of these hearings and has given me invaluable assistance that I would not be able to have otherwise, so that all of these hearings necessitate his presence. I think that a hearing outside of Illinois on a matter of this kind is unfair, is arbitrary and is oppressive, and violates any

due process that the Federal Trade Commission Act and the decisions accord respondence in similar situations.

415 I request counsel to state what he thinks the witnesses will prove, and perhaps we can stipulate and do away with a hearing in St. Louis.

Examiner Royal: The objection is overruled. If counsel wishes to present his motion in writing, it will be considered by the Commission, but at this time, considering the entire matter, the motion will be denied.

Mr. Krein: I would like the record to show an exception.

Examiner Royal: The exception will be noted. Let the record show that this hearing will be reconvened in St. Louis at a location to be fixed by notice, at nine o'clock a. m., Central Standard time, October 2, 1937. Notice undoubtedly will be received from the Federal Trade Commission in Washington by counsel for the Commission and for the respondent as to the room number in which the hearing will be held.

(Whereupon, at 3:15 p. m., Central Standard time, July 27, 1937, the hearing in the above entitled matter was adjourned to 9:00 a. m., October 2, 1937, at St. Louis, Missouri.)

418 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—2695) * *

106 Federal Building,
St. Louis, Missouri,
October 2, 1937.

Met, pursuant to adjournment, at 10 o'clock a. m.

Before:

Irvin D. Royal, Trial Examiner.

Appearances:

P. C. Kolinski, Esq., appearing for the Federal Trade Commission.

(There was no appearance for the Respondent.)

419 PROCEEDINGS.

Examiner Royal: This is a hearing in the matter of Bunte Brothers, Inc., Federal Trade Commission Docket No. 2965.

The last previous hearing in the matter was held at Chicago, Ill., on July 27, 1937. At the conclusion of the Chicago hearing, adjournment was taken at reconvene at St. Louis, Mo., October 2, 1937.

This hearing is convened, pursuant to adjournment and notice, at 10:20 o'clock a. m., Central Standard Time, October 2, 1937, at Room 106, Federal Building, St. Louis, Mo. Mr. P. C. Kolinski appears as Counsel for the Commission. There is no appearance for Respondent.

Mr. LeRoy Krein has advised the Trial Examiner by letter giving his reasons for Counsel for Respondent not appearing.

Mr. Kolinski: Within the past ten days, Mr. L. R. Krein, associate of Samuel Clawson, Respondent's attorney, field a motion objecting to hearings outside of the Chicago, Ill., area. Mr. Krein had previously agreed to and appeared for Respondent at a hearing in Indianapolis, Ind., on June 23, 1937, likewise, on July 27, 1937, when this hearing was adjourned to October 2d, at St. Louis, Mo. Mr. Krein made no objection to the fact of a hearing in St. Louis, Mo., but did state that the date chosen
420 was his birthday, and he was concerned about that fact.

I am informed that Mr. Krein has written the Examiner that he would not be present at this hearing this morning, and I, therefore, request that the Examiner order us to proceed at this time.

I want to state further that four witnesses have been subpoenaed for this hearing. Two are already present. I learned yesterday at the office of a Missouri manufacturer, subpoenaed to appear here today, that he was detained out of the city on business, and might not be present. This witness had wired the offices of the Commission in Washington.

Examiner Royal: You are ready to proceed with the witnesses that are present?

Mr. Kolinski: I will call Mr. Ben Lichty. Mr. Lichty has been regularly subpoenaed.

BEN LICHTY was thereupon called as a witness for the Federal Trade Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Kolinski.

Q. What is your name?
A. Ben Lichty.
Q. Mr. Lichty, what is your occupation?
A. I am a jobbing salesman, selling candy.
421 Q. How long have you been engaged in that?
A. I have been selling candy to the jobbing trade for 30 years.
Q. What company or companies do you represent?
A. I represent Henry Heide, Inc., New York—just one company.
Q. Where is their plant located?
A. New York City.
Q. And you sell to the jobbing trade where?
A. I sell to the jobbing trade in southern Illinois, south of Peoria, Missouri, Kansas, Iowa, Nebraska, North and South Dakota, Minnesota; and I have a couple towns in the northern part of Wisconsin, and about three towns in the northwestern part of Kentucky.
Q. In what portion of Illinois do you not sell your product?
A. North of Peoria, but including Peoria. I might say north of Bloomington, I guess, would be better.
Q. And about how many miles to the northern boundary of the State line is that, approximately?
A. About 250, I would say offhand, 250 or 300 from the northern boundary.
Q. And how much south of Peoria does it amount to in miles, Peoria to Cairo?
A. That is just about half, I would say it would be about 300 miles.
Q. About half the State?
422 A. Just about half the State.
Q. And do you know how many counties you cover?
A. No, I do not.
Q. And what class of trade do you sell to?
A. Wholesale candy jobbers, tobacco jobbers, wholesale druggists, and wholesale grocers.
Q. And to about how many such distributors do you sell in Illinois?

A. In Illinois, I would say about between forty and fifty.

Q. And about what volume, in dollars, do your sales run annually?

A. Well, they will run in that territory, they will run over $15,000.

Q. A year?

A. Yes.

Q. Did they so run in 1935?

A. Yes, I think they run just about the same.

Q. And in 1936?

A. Just about, approximately. There is a certain percentage of increase in my territory in sales in dollars and cents, and it is equally distributed over the territory.

Q. And that volume of approximately $15,000 represents candies delivered to wholesalers and jobbers from whom you received orders in the Illinois territory?

A. Yes.

423 Q. And it was candy that was manufactured in the State of New York by the Henry Heide Company and shipped from New York to these customers you located?

A. Correct.

Q. In Illinois?

A. Yes, sir.

Q. Are you familiar with the trade distinction between straight candies and what are called assortments or deal candies?

A. Well, there are two kinds of deals. There are deals that are put out with a premium, and there are deals that are put out with a punchboard and take.

Q. And by "take," you mean break-and-take?

A. Break-and-take.

Q. You are familiar with a form of break-and-take under which in an assortment certain designate units, if procured by the purchaser, entitles the purchaser to a prize?

A. I have sold them in years gone by.

Q. You know them?

A. Yes.

Q. I show you Commission's Exhibit No. 1, and Exhibits Nos. 2-A and 2 B, in this case, being legends, and box front accompanying an assortment sold by the Respondent in this case. Exhibit 1 is called "Summer Bar Assortment," and consists of 160 caramels, of which 16 are chocolate colored, and 16 assorted bars, and a

424 one-half pound box of candy. The Takeaflyer assortment consists of 160 chocolate creams, of which twenty are orange-colored in the centers, accompanied by twenty assorted bars, and a one-half pound box of candy. The purchasers of caramels which are chocolate-colored on the inside, or purchasers of the twenty caramels which are orange-colored on the inside, procure one of the sixteen or twenty assorted bars, and the last purchaser of the 160 caramels or creams, procures the half-pound box of candy. Are you familiar with that type of break-and-take assortment?

A. Yes.

Q. You have seen assortments of that type in your territory?

A. Yes, I have. In previous years I have sold the same type.

Q. And in the years 1935 and 1936, can you name some points in your Illinois territory in which you saw such assortments offered for sale?

A. Yes, I can name a lot of points. In fact, I am thoroughly certain they are sold in all points, but I do know they were sold in Decatur and Springfield, and in Danville. In fact, as I stated before, I remember seeing those assortments in those towns I have enumerated there, but they were sold generally all over the territory, that class of draw, not that particular draw, I don't remember, I can't state that I seen the draw that you 425 have on the exhibit there. I have seen similar ones.

Q. And you saw those in the years 1935 and 1936?

A. Yes.

Q. How recently have you had a demand for such a draw?

A. I had a demand Thursday afternoon down in Illinois, southern Illinois. A jobber asked me, "Have you got any breaks-and-takes?" I said, "You know I haven't." He said, "If you had some breaks-and-takes I would give you a nice big order."

Q. I didn't get the last.

A. He said, "If you had some breaks-and-takes I would give you a nice big order."

Q. What city was that in?

A. West Frankfort, Ill.

Q. West Frankfort?

A. I used to sell this party, in fact, I sold him more candy than I sold all the jobbers down there put together, and he would almost buy, always in a break-and-take, but since I have had the present line which does

not carry any breaks-and-takes my business from him is almost nothing. In fact, he has scratched around to give me a complimentary order.

Q. And the fact that you have lost business from him you ascribe to the prevalence of the demand for breaks and takes in his territory?

426 A. Oh, absolutely. That is a specific case. That is actual.

Q. Is it your feeling that a manufacturer who carries a break-and-take, has an advantage over the salesman who does not carry a break-and-take?

A. He does, as a rule, because the break-and-take is usually something a little different, something new, and the jobbers are interested in it more than in your regular line of candy.

Q. And just how does that advantage work out to such salesmen?

A. Well, you go in there with a break-and-take, and he will give you an order for that, and then it is really a door opener, because you will say, "Well, John, I got something else here I want to show you." You can add to this shipment, and ship with this order, and you can—lots of times he don't want to buy enough for a shipment, but if he buys a draw deal, or something like that, he has got enough for shipping weight there, and you get him started and he will buy right down the line.

Q. By "down the line," you mean he buys straight goods which are not accompanied by a draw feature?

A. Absolutely.

Q. And, to that extent, does that handicap the salesman who has only straight goods to sell?

A. Yes.

Q. Now, these draws which you have seen in the

427 State of Illinois, in your territory, were in the penny field?

A. Yes.

Q. The line which you sell, does that consist of penny goods in some measure?

A. The penny goods—the big percentage of our line are penny numbers.

Q. Now, have you a personal opinion on the effect of penny breaks and takes on the candy business, generally?

A. Yes, I have. The average jobber that buys break-and-takes there, they like them a whole lot, because they get their profit on it. They sell them for their regular price, the price is not cut on them. In other words, the

big wholesale grocer, jobber, all those classes, do not bother with the draw numbers, and they let them get their price on them, and for that reason the jobber would rather handle, the candy jobber would rather handle the break-and-takes than he would the penny goods, because he can make a profit on them.

Q. Now, in the territory, in the State of Illinois that you serve, have you observed, in the years that you have been selling that territory, any effect of the sale of penny breaks-and-takes upon the legitimate candy industry in general? Has it detracted or added to the general line of candies sold?

A. Oh, it has detracted from your general line of penny goods, because a jobber will take just an automo-
bile pleasure car, buy a shipment of draws, put them
428 in his car, go around and sell them; buy another
shipment; whereas, he could not buy a line of staple items, not being a number of different varieties. In the first place, he would not have any place to put them, would not have any place to carry them, would not have the capital to handle it, and the legitimate jobber maintains a ware room, as well as a sales force, delivery wagon, and gives them service. He has to compete with this fellow who has no overhead at all.

Q. And it has been your observation then, in your Illinois territory, that the jobber who is distributing penny breaks-and-takes, thereby cuts into the amount of legitimate business to be sold by the salesman who does not carry breaks-and-takes?

A. Absolutely. The jobber who handles breaks and takes, I have a very hard time getting any business from him on the legitimate penny goods, because he has got his money tied up in breaks and takes, and does not care to bother with it.

Q. Your observation in Illinois has been that the sale of penny breaks-and-takes has reduced the volume of sale of legitimate penny candies which are not accompanied by breaks?

A. It has.

Q. During the years 1935, 1936 and 1937, you have not carried any breaks and takes?

A. No.

Q. You named Danville, Decatur, and Springfield
429 as the larger areas in which these breaks and takes
sold. Can you think of any other sections?

A. Well, West Frankfort, Ill., Murphysboro, Ill., Quincy, Ill.

Q. During the years 1935 and 1936 and 1937, about, would you say that you met those breaks and takes among jobbers generally in the territory in Illinois that you serve?

A. I would say that practically every jobber, they are handling some sort of break and takes.

Q. And you have had demands for them, have you?

A. Oh, yes.

Mr. Kolinski: I think that is all, Your Honor.

By Examiner Royal:

Q. You stated about the demand for the break-and-take goods in 1935 and 1936, and you have given one request you had for that type of goods which came up last Thursday. Have you had other requests this year for that type of goods?

A. Well, I don't, haven't paid much attention to the break-and-takes unless it comes—now, this is just fresh in my mind, but I would not want to state that I had, although I am positive I have had requests for them.

Q. That is, you have requests from your customers for the goods since the beginning of 1935, right down to the present date?

A. For breaks-and-takes.

430 Q. For breaks-and-takes.

A. May I answer, that in my general territory—or does that just apply to Illinois?

Q. In your territory, but territory in Illinois.

A. I have had inquiries all over my territory, including Illinois, from time to time for penny breaks-and-takes.

By Mr. Kolinski:

Q. I have a further question: In the years of 1934 and into 1937, during the operation of the National Recovery Administration, did you notice that less breaks were sold in Illinois?

A. That is while the N. R. A. was in effect?

Q. Yes.

A. Yes, that is very plain in my mind, because Illinois had a very strong jobber's confectioners association there, and they followed the letter of the N. R. A. pretty strict. The members worked against any handling of draws, because they were getting a legitimate price on a regular penny number, and the 5-cent bars. That is especially true in Decatur, Ill. I know for quite a while, while the N. R. A. was in force, that any—Decatur, there were no draws, penny draws, handled at all there. There was one jobber there who was quite active in the Asso-

ciation, who took it upon himself to—he would walk into a retail store there and if they had a break-and-take there, he would pick it up, put it under his arm, and says, "Wherever you bought that from, why, just tell
431 them I picked this up. It is illegal. Make them give you your money back." Now, that is how I happened to remember, because at that time they were very strict, and after the N. R. A. was dismembered, or whatever you want to call it, the market was again flooded with the breaks and takes, that was, everybody started to handle them, even in Decatur, where they had not handled them before. In fact, this one jobber, if you show him a break-and-take there, he would pretty nearly throw you out of his business house there for a while. He was that strong against it.

Q. Would you say that in the case of the Respondent Company, who marked 80,000 units of the break-and takes represented by the exhibits here, in 1935, would you say that that had effect along with other breaks, on the legitimate business?

A. Certainly.

Q. And the marketing of 36,000 in 1936, would that have the same effect?

A. It would.

Q. You answered that your company does not handle the break-and-take, does it?

A. They do not.

Q. And you are known to your trade as carrying only the Heide candy line?

A. I am.

Q. Which includes no break-and-takes or draws?

432 A. No.

Q. The trade knows that you are not carrying a draw, in other words?

A. Absolutely.

Q. In spite of that you have had from 1935 through to date, periodic demands for a break?

A. I have. I have had jobbers make the statement that, "If you had some breaks-and-takes I could give you a whole lot more business." And they get, when you take all that amount of dollars and cents that is put in, that they paid, I don't know that they bought that many in Illinois there, but they would buy pretty near that much more straight candy if they were not putting their money in those.

Q. That is your definite observation along that line?

A. Absolutely.

Q. You are convinced that the money that has gone into breaks in the State of Illinois during these years is money which would, if breaks were not sold, that money would have gone into legitimate penny candies?

A. It stands to reason it would.

Mr. Kolinski: I have no further questions.

Examiner Royal: You will be excused.

(Witness excused.)

W. J. McMILLIN was thereupon called as a witness
433 by the Federal Trade Commission, and being first duly sworn, testified as follows:

Direct Examination by Mr. Kolinski.

Q. What is your name, please?

A. W. J. McMillin.

Q. Mr. McMillin, what is your occupation?

A. I am a broker.

Q. Selling what products?

A. Candy.

Q. How long have you been selling it?

A. Well, I have been selling candy since 1921.

Q. And in what territory have you been selling it?

A. Missouri and Illinois, and part of Iowa and Indiana; that is, southwestern Indiana and eastern Iowa.

Q. What companies do you represent?

A. I represent the New England Confectionery Company, of Cambridge, Mass., and Newton Products Company of Cincinnati, Ohio.

Q. What type of candies do these companies sell?

A. We sell what we would call staple merchandise.

Q. And does that include penny lines?

A. That is penny and five-cent bars.

Q. The penny line being candies designed to be sold at retail for one penny?

434 A. One cent, yes, and five cents.

Q. And you represent those companies in the State of Illinois?

A. Yes, sir.

Q. In what portion of the State of Illinois do you represent them?

A. In, I would say, the southern half.

Q. The southern half of the State?

A. Yes.

Q. Do you know about how many counties?

A. Well, no, I couldn't exactly say. See, I come over from Rock Island to Monmouth, to Galesburg, to Peoria, to Bloomington, to Champaigne, and Danville, and everything south. I work those towns.

Q. And, north, you do not?

A. No, I do not.

Q. These companies have some representatives in that section?

A. Yes, with my line, our Chicago representative has that part.

Q. About what volume of the products of the New England Confectionery Company do you sell in the Illinois territory you have just described annually?

A. Oh, I don't know whether I could truthfully give you that estimate in there or not.

Q. Can you give a reasonable approximation?

435 Just take your time.

A. On, I would say possibly, oh, $20,000, or something like that.

Q. And did you sell such volume in 1935, in that territory?

A. No, sir.

Q. What was the volume in 1935?

A. Oh, I would say somewheres around ten or fifteen.

Q. And in 1936 it was around twenty?

A. Well, it gradually got up to about that at the present time, but I really think that that is due to decrease in price of products.

Q. Well, had that something to do with the depression?

A. That I could not say. We formerly got 64 cents for our merchandise in that territory. For some reason or other it dropped down to 60 cents east of the Mississippi, decrease.

Q. And that did result in increased dollar volume of sales?

A. Yes, sir.

Q. And you ascribe the decrease to that?

A. Yes, sir. That I know to be a fact in that case.

Q. And about what volume in the years 1935 and 1936 of the New Products Company's candies did you sell?

A. That, I would say, would not amount to $200.

Q. A year, or what?

A. A year.

Q. Each of those years?

436 A. Yes.

Q. In that particular territory?

A. Yes. Yes. We were out of line on—see, they manufacture chocolate-coated peanuts, clusters, and suckers, and we were absolutely out of line. Today, they have one bar called "Rough Stuff" that they actually sell, but, otherwise, their business has been very, very small; the only business they have got is right here in St. Louis, because the Freda Company, that Newton Products bought out, was formerly from St. Louis here.

Q. What are the lines of the New England Confectionery Company that you sell in the State of Illinois?

A. What are the lines?

Q. What lines? What products?

A. You mean the names of them?

Q. Describe them, yes.

A. "Pocket Money," that is a penny piece, small lozinger, or, I would say, it is a small lozinger in a penny package.

Q. Name some of the others.

A. And then they have "Sweet Smokes," that is five for a penny, chocolate-flavored cigarettes; then we have "Sugarettes," that is four for a penny, little while vanilla-flavored cigars, wrapped in Cellophane, then we have lady sticks, that is a four-for-a-penny number, also loose.

In other words, they call it, some of them say it is
437 bulk, but it is not. It is a penny piece, four for a penny. Well, we have penny rolls, that is "TT" lozinger, wrapped in a Cellophane package, for a penny, and we have Dairy Churn fudge.

Q. About what proportion of the volume of the New England Confectionery candy consist of the penny line that you sell in Illinois?

A. I would say that pretty nearly 80 percent of my business is penny business.

Q. About how many jobbers do you sell in your Illinois area?

A. That I could not hardly answer correctly, but I would say possibly seventy. I doubt whether there is that many over there. Understand me, now, there is more jobbers over there, but I don't sell them all because I have what the fellow says, "I have some exclusive accounts." For that reason, I do not call on all of them, and some of them that I do not call on, their credit is no good. It is no fault of mine, but the house will not ship them, see.

Q. But these approximately seventy jobbers in the southern half of Illinois that you call on, you call on at what intervals?

A. About every six to eight weeks.

Q. Are you familiar with the distinction in the trade parlance of the candy industry between so-called straight candies and so-called deal candies that are assortments?

A. Well, in what way do you mean, deals?

438 Q. Deals.

A. One free with each purchase?

Q. That are accompanied by a chance feature, whether it be break-and-take, pick-and-draw, or punchboard?

A. In other words, you are not speaking of a deal. You are speaking of an assortment of chance, that is made up.

Q. You are familiar with such chance assortments?

A. Yes, there are several types of them.

Q. I show you Commission's Exhibit No. 1, and Commission's Exhibits Nos. 2-A and 2-B in this case, being legends, box cover, describing an assortment sold by the Respondent. One is called Summar Bar Assortment, and consists of 160 caramels, of which 16 are chocolate centers. There are 16 assorted bars and a half-pound box of candy. The Takaflyer assortment consists of 160 creams, of which 20 are orange centers. There are 20 bars and a half-pound box of candy. The 160-unit items are designed to be sold at one-cent each. Purchasers who procure those with the odd center, either chocolate caramels or orange creams, procure one of the assorted bars, and the last purchaser of the 160 units procures the half-pound box of candy. Are you familiar with that type of assortment?

A. To tell you the truth, I have never seen either one of them.

Q. Sir?

A. I haven't saw either one of them in the territory.

439 Q. You have never seen one of these?

A. No, sir.

Q. But have you seen assortments of that character?

A. Yes, sir. Yes, sir. I have seen different assortments of this kind.

Q. What are they called? I don't mean by name, but general designation for them.

A. This here would be a draw. That is what they call a draw.

Q. Have you seen such draws in your territory?

A. Yes, I have seen draws, but I have not saw these.

Q. Have you seen such draws in the year 1935 and the year 1936 and the year 1937, to date?

A. Yes, sir.
Q. How frequently have you seen such draws?
A. They are in every jobber's place.
Q. Have you had jobbers ask you for such draws?
A. No, sir.
Q. Have you observed whether such draws carried by jobbers in your Illinois territory, whether they have had any effect upon the sale of legitimate candies not accompanied by a draw?
A. Well, now, that I could not say because I am not familiar with that stuff as affecting the sale of the standard product.
Q. Would you say that the broker who carries a
440 draw has an advantage on the broker who does not carry a draw?
A. No, I would not say that. That I could not answer in that light, for the simple reason that I know brokers that are carrying draws that are not making a living out of them, and I know other fellows that is carrying straight merchandise that I am, are not making a living out of it. So I could not say that either one of them would be affected by either item. As far as my knowledge, understand that, I could not say, because I do not know what they are really making, but I do know that I hear the boys complain about it. They say, "Why can't I sell them?"
Q. What was the last?
A. They say, "Why can't I sell that merchandise?" They will go into a jobber, and they get—that jobber has been asking several men about penny draws, and he has draws, and they won't buy his draws. Why don't they buy it. I could not explain.
Q. Have you ever observed whether the draw in the hands of a salesman acts as a door opener?
A. No, I could not say.
Q. You haven't observed that?
A. No.
Q. In your experience in the candy industry since 1921, from that experience have you observed whether there is any effect of break-and-takes upon the sale of legitimate candies, in general?
441 A. Well, I can't see where there was any difference. I can cite facts. I worked for Walter Johnson Company for a number of years, and I can go back, I will say about 7 years ago, when I had their line, and they formerly made what was known as a one, two, three fea-

ture, one, two, three, four, five, or a ball game, or a football assortment, or a—

Q. Well, what was the result of your observation?

A. Well, we quite making these draws, or these chance packages, and went to making straight merchandise, and got more business on straight merchandise in my particular territory than I used to get on the draw packages.

Q. Do you still handle the Walter Johnson line?

A. No, sir; I have not had Walter Johnson's now for 5½ years, but that was my actual experience at that time with that draw package.

Q. Has it been your observation in your Illinois territory that the amount of money spent on draw assortments does detract from the total volume of money available for candy, in general?

A. Well, I would imagine it would have some effect for the chance that the child would take on it, I would say that.

Q. And the money, then, that is spent for draws does detract from the amount of money available for all legitimate candies?

A. I would think so.

Q. From your experience in selling both types of 442 candy in the Illinois territory?

A. Yes, sir.

Q. You have found that to be the case?

A. Yes, sir.

Mr. Kolinski: I have no further questions, Your Honor.

Examiner Royal: You may be excused.

(Witness excused.)

JOSEPH C. BUERGLER was thereupon called as a witness for the Federal Trade Commission, and, having been first duly sworn, testified as follows:

Mr. Kolinski: Your Honor, I want to state that Mr. Buergler is the witness I referred to in my opening statement as being the manufacturer who was out of the city and might be detained. Mr. Buergler has cooperated in very fine fashion. He got here by the skin of his teeth, and I appreciate the fact that Mr. Buergler has respected the subpoena and is cooperating with us, at probably some expense to him.

443 Examiner Royal: We are glad to have you here, Mr. Buergler, and to get your testimony in its proper order.

Direct Examination by Mr. Kolinski.

Q. What is your name?
A. Joseph C. Buergler.
Q. What business are you in, Mr. Buergler?
A. I am a manufacturer's representative.
Q. What company, or what products?
A. Confections, and, well, I got a food product.
Q. What confections do you handle?
A. I represent the Angelus Camp Fire Company and the Cracker Jack Company and the Goebel Company, the Jack Rabbit Candy Company, the National Licorice, and the Goudey Gum.
Q. Any others?
A. Do you want the Herz Store Company?
Q. No. This covers all the confections?
A. Yes, sir.
Q. The Goudey Gum Company, do they sell a penny produce?
A. Yes, sir.
Q. In the confectionery field?
A. Chewing gum.
Q. That is sold wherever candy is sold. Where are they located?
A. Boston.
444 Q. Approximately what volume of their product do you sell in the State of Illinois a year?
A. That is pretty hard to say.
Q. Are you in position to give just a general figure?
A. I could not specify that now on account of the various items, you know, certain numbers sell more rapidly than others, and you just can't figure it.
Q. But, can you tell us approximately what volume of their products you sold in the Illinois territory in the years 1935 and 1936? Just give an approximation.
A. Well, I could not say exactly what the amount is.
Q. Can you give us a figure which would be a very minimum, say, was it less than, or was it more than 5,000 a year for each of those years?
A. Oh, I rather—it was a little more than that.
Q. For each of those years?
A. For the both years.
Q. The Angelus Marshmallow Company, and the

Cracker Jack Company, are Illinois corporations, are they not?

A. Well, they are located in Illinois.

Q. So far as you know, they are Chicago corporations?

A. They are in Illinois.

Q. The Goebels Company that you mentioned, where are they?

A. They are all in Chicago.

Q. The National Licorice Company are located where?

445 A. Headquarters Brooklyn, New York, Philadelphia, Moline, Illinois, Montreal, Canada.

Q. Did you sell any product of the National Licorice Company that was shipped into Illinois from an outside plant?

A. Sure.

Q. And about what volume in the years 1935 and 1936?

A. Oh, most of our shipments come from Illinois.

Q. But about what volume was there that came from the other plants?

A. You mean from Brooklyn?

Q. Yes.

A. Or Philadelphia?

Q. Yes.

A. A very, very small amount.

Q. In excess of, say $500 a year?

A. Not that much.

Q. About?

A. Out of Philadelphia or New York, on account of all shipments are made from Moline to our Illinois points.

Q. Would it be in excess of, say, $200 a year?

A. Not that much.

Q. About what figure would you put it at, to be covering certain special items that the Moline plant does not make, is that it?

A. Just the one product.

446 Q. What is it?

A. A 10 cent package of Swank, shipped out of Philadelphia, a very, very limited amount.

Q. Would it be in excess of $50 a year for each of those years, 1935 and 1936?

A. Just about.

Q. Now, the product of the Jack Rabbit Candy Company, you are interested in that company, are you not?

A. Yes, sir.

Q. Stockholder or officer?

A. Yes, sir.

Q. What office do you hold?

A. Secretary-treasurer.
Q. They are located where?
A. 600 North Second Street.
Q. What city?
A. St. Louis, Missouri.
Q. St. Louis, Missouri. Are they a Missouri corporation?
A. Yes, sir.
Q. And about what volume of their products did you sell in the state of Illinois in your territory, in the years '35 and '36?
A. I could not give you those figures on account of the—
Q. Give an approximation.
A. I would like to give it as correctly as possible,
447 and I just could not figure it out right now. The biggest business is in Missouri.
Q. But was there a substantial amount of Jack Rabbit Candy Company's products sold by you in the State of Illinois?
A. Yes, there was by Mr. Long, also my salesman. I have a salesman.
Q. Now, the product of the National Licorice, the Goudey Company, and the Jack Rabbit Company which you sold in the State of Illinois, was shipped there from the plants located respectively Brooklyn, Philadelphia, and Goudey is Boston?
A. Yes.
Q. Boston, Massachusetts?
A. Yes.
Q. And the Jack Rabbit Company is St. Louis, Missouri, was shipped from those points to the customers that you located in the State of Illinois?
A. Yes.
Q. Now, what part of Illinois do you sell this product in?
A. North from Springfield, Illinois, to Quincy, Springfield, Decatur, South to Cairo, Illinois.
Q. Roughly, the western one-third of the State of Illinois, western and southern?
A. What they call the southern Illinois.
Q: Southern Illinois?
A. Southern Illinois.
448 Q. You do not sell in the Chicago area?
A. No.
Q. No. North of Decatur or Peoria?
A. No. And then the National Licorice, we haven't got Decatur or Springfield, just south—Southern Illinois.

Q. How about the Jack Rabbit Candy Company's products?

A. Well, we sell in Springfield, Quincy, and Decatur, and south.

Q. You are not in a position to give an approximate figure on the amount of Jack Rabbit Company's?

A. I could not do that.

Q. Is it in excess of $10,000 a year for the years 1935 and 1936?

A. I just could not give the right or correct estimate.

Q. I am asking only for an approximation.

A. I just could not hardly know any figures.

Q. All you can say is it is a substantial amount?

A. Yes, it is. East St. Louis, and other—

Q. How many brokers do you call on in your territory, approximately?

A. Brokers or—

Q. I mean jobbers.

A. Jobbers?

Q. Yes.

A. The entire territory?

449 Q. Yes, the Illinois territory.

A. Oh, I would say about 75 or 80.

Q. And about how frequently do you call on them?

A. Every six weeks.

Q. The lines of the National Licorice, the Goudey Candy Company and the Jack Rabbit Candy Company.

A. That is the Goudey Gum Company.

Q. The Goudey Gum Company, including penny items, do they not?

A. Yes, sir.

Q. About what proportion of those three company's lines that you sell include penny candies?

A. I would say about 70 per cent.

Q. Seventy per cent. Are you familiar with the trade distinction in the candy industry distinguishing between straight candies and assortment candies that are accompanied by chance features?

A. Am I acquainted?

Q. Yes.

A. Yes, sir.

Q. I show you Commission's Exhibits Nos. 1 and 2-A and 2-B in this case, describing two assortments. Summer bar assortment consisting of 160 caramels of which 16 are chocolate centered. In addition there are 16 assorted bars and a half-pound box of candy; the Takaflyer bar as-

450 sortment consists of 160 chocolate creams, of which 20 are orange centered. There are 20 assorted bars and.

a half-pound box of candy. The assortment as offered for sale covers the price of one cent for each of the 160 units. The purchaser procures one of the chocolate centered or orange centered units, procures in addition without extra charge one of the assorted bars. The last purchaser of one of the 160 units procures the half-pound box of chocolates. Just look that over. Are you familiar with such assortments?

A. Yes, sir.

Q. Have you seen them in your Illinois territory?

A. I have seen draws, but not these particular.

Q. About how frequently have you seen draws in your territory, and about what city?

A. Well, I cover the City of St. Louis more regularly than the Illinois territory.

Q. But, in the Illinois territories which we are concerned with here, how frequently have you seen draw assortments in the years 1935 and 1936?

A. Well, you could see them in every, almost in every jobbing house that you called on.

Q. You, yourself, have seen them in most of the jobbing houses that you have called on in that territory in those years?

A. Yes.

451 Q. And have you had jobbers ask you for a draw?

A. Yes, there were some draws.

Q. How frequently do they ask you for them?

A. Well, of course, when you show your line, they ask you whether you got a draw.

Q. Those you regularly call on know, of course, that you do not carry them, don't they?

A. Yes.

Q. And some of those that are not so well acquainted with you will ask you for a draw?

A. Yes.

Q. Have you ever had a jobber tell you that he could give you business if you carried a draw?

A. Well, we already have had a draw. Of course, like every other candy item, they always look for something new.

Q. You do not carry a draw now, do you?

A. No. I have not got a draw now.

Q. Did you carry one in 1935 and 1936?

A. We have had only about two draws.

Q. In what years?

A. And then we discontinued it.

Q. When did you discontinue it?

A. They called a baseball bat deal, that was a stick of candy.

Q. When did you discontinue that?

452 A. Just a few months ago.

Q. Have you found, as a matter of your experience in selling jobbers in the State of Illinois, that there is an advantage to carrying a draw?

A. To a certain extent, yes.

Q. And just what is that advantage?

A. Well, it seems as though it is a popular number.

Q. Does it enable you to sell other merchandise which has no draw feature?

A. To a certain extent.

Q. You have found that it acts as an order opener?

A. It helps?

Q. And since you have discontinued carrying draws, have you found that in the case of some jobbers you are getting less business?

A. Well, I do not think at the present time, on account of, I think a lot of the draws have been discontinued, and the trade is somewhat side-stepping it.

Q. Now, how long have you been in the candy business?

A. I have been conducting my business since March, 1923, 14 years. Previous to that I was in the selling business, and we also sold confections from about 1900, about 18—5 years.

Q. During all that period have you sold in the Southern Illinois territory?

A. Southern Illinois territory and Missouri.

453 Q. And the respondent manufactured 80,000 units of such draws in the year 1936. Would you say that the presence of so many units in the State of Illinois, being sold to the candy purchasing public, had any effect upon the sale of legitimate straight candies not accompanied by draw?

A. It has.

Q. What effect would that be?

A. Just seem to curtail the sale of regular penny items.

Q. And that has been your direct observation from your contact with candy jobbers in the State of Illinois, is that right?

A. To a certain extent, yes.

Mr. Kolinski: I have no further questions.

Examiner Royal: You are excused, Mr. Buergler.

(Witness excused.)

WALTER PRAECHTER, was thereupon called as a witness for the Federal Trade Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Kolinski.

Q. Will you state your name?
A. Walter Praechter.
Q. What business are you engaged in, Mr. Praechter?
454 A. Selling candy.
Q. How long have you been selling candy?
A. About 23 years.
Q. You are a manufacturer's representative?
A. No, I am a broker's representative.
Q. A broker's representative?
A. Who represents manufacturers.
Q. And you sell to jobbers and wholesalers?
A. Yes, sir.
Q. What territory do you cover?
A. Half of Illinois and half of Missouri.
Q. Which half of Illinois?
A. The southern half from Peoria south.
Q. The southern half from Peoria south. Do you know how many counties that covers?
A. I do not have any idea.
Q. About how many jobbers' accounts in that section do you cover?
A. About 100.
Q. About 100 and you sold that territory in the years 1935 and 1936, and to date?
A. Yes, sir.
Q. What company's products do you sell in that territory?
A. Smith Brothers Cough Drops, and Peter Paul Inc. line. That is all 5-cent bars, and penny items.
455 Q. About what proportion of the Peter Paul line is 1-cent items?
A. What proportion?
Q. Yes.
A. About a quarter of their production.
Q. And what other company's products do you sell?
A. The Sweets Company.
Q. Where are they located?
A. New York.
Q. What proportion of theirs is a penny line?
A. About 80 per cent.

Q. What other companies?
A. The Pulver Company, Rochester, New York, the Pulver Gum Company.
Q. Peter Paul is located where?
A. Naugutuck, Connecticut.
Q. And Smith Brothers Cough Drops?
A. Poughkeepsie, New York.
Q. And the other companies?
A. That is all.
Q. Do you sell any product of Fenn Candy Company?
A. Oh, yes. Well, we do not do much on that. Fenn Brothers at Sioux Falls, South Dakota. That is our weakest line. We haven't started on that yet this season. We only handle it during the winter months.
456 Q. But you handled it last season?
A. Oh, yes.
Q. Does that include any penny goods?
A. All 5-cent. Now, it is possible they make a penny item, but I have never seen a sample.
Q. But the Pulver Gum Products?
A. Is a hundred per cent penny.
Q. Now, are you in position to give us an approximation on the volume of each of those products that you sell in your territory, and did sell in the years 1935 and 1936, just an approximation?
A. What do you mean?
Q. Well, now, how much of the Peter Paul products did you sell in the Illinois territory of your territory, in the Illinois portion of your territory, in 1935 and 1936?
A. Oh, I would say about $100,000 worth.
Q. And in each of the years?
A. Yes.
Q. And Smith Brothers Cough Drops?
A. Well, it is $58 a case, I would say, about 150 cases each season in that territory, that is $58 for 50 boxes.
Q. About $7,000 annually. And the Sweets Company of New York?
A. For those two years?
Q. Yes. Just an approximation.
457 A. About $40,000.
Q. Each of those years?
A. Yes.
Q. And Pulver Gum?
A. About $2,000.
Q. And Fenn?
A. About $1,000.
Q. Now, that product was sold by you to these distribu-

tors in southern Illinois, the orders were transmitted to the home office of these companies?

A. First of all, those figures, they are all just a guess, they may be up and down, you know.

Q. They are reasonable ones, are they?

A. Well, I would say yes.

Q. In any event, there was a substantial commerce that you developed?

A. Yes.

Q. You procured the orders in your territory for the products of these companies, shipped the orders into a central office, and the product was shipped from the place where these companies are located?

A. Yes, sir.

Q. Being Connecticut, New York, and South Dakota, and shipped to your customers in Illinois, where located.

A. In the territory.

458 Q. Are you familiar with the trade distinction in the candy industry between straight candies and what are known as assortments or deal candies that are accompanied by a chance feature?

A. Yes, sir.

Q. I will show you Commission's Exhibit 1 and 2-A and 2-B in this case, being legends on the box cover of assortments being sold by the Respondent. What is called summer bar assortment consists of 160 caramels, of which 16 are chocolate centered. There are 16 assorted bars, and a half-pound box of candy. The other is called Takaflyer bar assortment, consisting of 160 chocolate creams, of which 20 are orange centered. There are 20 assorted bars and a half-pound box of chocolates. The assortment is offered for sale by retailers of 160 units, to sell at one cent each, and the purchaser procures one of the 16 caramels or 20 creams that have the odd center, procures in addition, without paying for, one of the assorted bars, and the last purchaser for the 160 units procures the half pound box of chocolates.

Are you familiar with such type of assortment?

A. Yes. I am familiar with that type of assortment.

Q. And have you seen it in your territory?

A. I haven't seen either one of these two.

Q. But have you seen break-and-take assortments of that sort in your territory?

459 A. Sure.

Q. Have you had calls for such from your jobber customers?

A. Practically every account will say, "Have you got a draw?"

Q. Did they make such requests of you in 1935 and 1936?

A. And 1937.

Q. Do you recall any recent such requests?

A. Six weeks ago.

Q. Where was that?

A. Popular Bluffs, Missouri.

Q. Do you recall any such requests in the Illinois territory?

A. Not lately.

Q. Not lately. Have you had such requests in the Illinois territory?

A. Off and on, yes.

Q. And during the years 1935 and 1936, have you seen such draws in the stocks of jobbers in your Illinois territory?

A. I have seen all sorts of draws, but don't know whether they were either one of these two.

Q. You do not specifically recall either one of these?

A. No.

Q. But you have seen draws that bore on that basis in the penny line. Has it been your observation from your work in the Illinois territory that the presence of such penny draws has an effect upon straight candies that
460 are not connected with the chance feature?

A. Yes.

Q. What is that effect?

A. Well, to this extent, that when a child, I have seen children in retail stores take a nickels worth that entitles them to about five small pieces of candy, and they bite into each piece so as to view the center, and realizing that they did not win, they throw the candy on the floor and their nickel was gone.

Q. You have seen that, actually?

A. Oh, yes.

Q. And has it been your observation in the State of Illinois that the sale of penny draw assortments of the type evidenced by exhibits 1 and 2 has an effect on the volume of straight goods sold?

A. Yes.

Q. What is that effect?

A. Well, if there is a demand for draws in different communities, and draws are presented to the jobbers, the jobber who has bought them, more or less bought a quantity because he is always under the impression there won't be any more, and, therefore, a jobber only has a certain

amount of money to spend, and naturally your order on straight merchandise is reduced.

Q. So that a salesman who carries a penny draw
461 assortment of the break-and-take character, such as these exhibits disclose, has an advantage on the salesman who does not carry such assortment?

A. If it is attractive, and it is not a duplication of another draw, or if it has just a little more flash here, it is a hundred to one chance that the jobber will buy.

Q. And the respondent in this case manufactured 80,000 units of such assortments?

A. Who?

Q. The respondent in this case.

A. Oh.

Q. In the year 1936, and sold them in the State of Illinois. Will you say that the presence of 80,000 units would have an effect on the sale of straight candies in the State of Illinois?

A. What was that question?

Q. Would you say the sale of such 80,000 units would have an effect upon the sale of straight candies in the state of Illinois, not accompanied by—

A. Yes, because if you make a survey of retail stores, the retailer can place Tootsie Rolls, one cent Hershey, or any other quality penny item and a draw right along side. Invariably the kid will take a chance.

Q. So that your observation is that during the years
462 1935 and 1936, particularly, and down to about date in 1937, the sale of penny break-and-take chance assortments in the State of Illinois has had a direct effect upon the sale of legitimate penny candy lines that were not accompanied by a chance feature?

A. Absolutely.

Q. Your answer is yes?

A. Yes.

By Examiner Royal:

Q. As a matter of fact, had there been a reduction in the sale of straight goods?

A. Well, yes. There has been a reduction.

Q. You say it has had an effect. I want to know whether this effect is for the benefit or for the detriment of the straight goods.

A. It has had an effect on the one-cent items that did not accompany chance to the extent of retarding the sales, but the most serious effect of it is that it did not give a legitimate one-cent item an opportunity of building, as to

new producers. In other words, if a child has a nickel to spend, and will take one penny's worth of a legitimate item, and starts consuming that legitimate item, wondering how to spend the other four pennys, and then when this child sees that chance, and at the same time, eating this first purchase, and sees that chance, he is going to possibly spend the four pennies for the draws, and at the same time after he has lost, realizes that he likes that
463 first purchase very much, and he is sorry he did not save possibly one of those pennies to buy another piece that met with his approval as to taste, so there is a sale lost there.

Q. So the effect would be a reduction in volume of the straight goods?

A. A reduction, yes.

By Mr. Kolinski:

Q. How often do you contact your jobbers?

A. Six weeks, every six weeks.

Q. And from your contacts with these jobbers during the years 1935 and 1936 and 1937 to date, you reached the conclusion that the presence of penny break-and-takes assortments affects the sale of legitimate candies by detracting from the volume of legitimate candies that would be sold if the penny break-and-take assortment were not on the market?

A. Yes. But everybody selects a good break-and-take because there is possibilities in selling it, and that is where the commission is based on. I do not think there is a man traveling that would refuse a good break-and-take.

Q. Because it gives him an advantage in selling his entire line?

A. Sure. Sure.

Q. It acts as an order opener?

A. Sure.

464 Q. And the agent or representative who carries a break-and-take has an advantage over the man who does not?

A. Well, he can make his entrance by saying, "I have got a darned good draw."

Q. And you find in the southern Illinois territory among the 100 or more jobbers that you serve that they are always on the alert, on the lookout for a draw, isn't that it?

A. Well, lately I have not troubled myself to even inquire as to who is making them or who is not making them, because it takes all of my time now to discuss the other things.

Q. But I mean, in particularly, during the years 1935

and 1936, among these hundred jobbers that you were serving, they were, you found jobbers who were looking for a draw?

A. Yes. For something new, for something new in a draw, because retailers tire of the same one, and the children tire of the same one.

Q. And the presence of those draws during that period did detract from the volume of straight candy sold?

A. Yes, sir.

Mr. Kolinski: I have no further questions.

Examiner Royal: You will be excused, Mr. Praechter.

(Witness excused.)

Mr. Kolinski: Now, Your Honor, I ask that this proceeding be adjourned to Monday, October 18, 1937, at 10 o'clock a. m. in Room 500, 45 Broadway, New York
465 City, being the Commission's New York City office.

I have already indicated to counsel as far back as September 1st that such New York hearing would be held, and counsel has acknowledged receipt of my notice to him.

Examiner Royal: That is October 18, Mr. Kolinski?

Mr. Kolinski: October 18.

Examiner Royal. At what time?

Mr. Kolinski: Ten o'clock a. m., Eastern Standard Time.

Examiner Royal: Ten o'clock a. m., Eastern Standard Time.

This hearing will be adjourned to reconvene at the time and place referred to by Mr. Kolinski.

Mr. Kolinski: I may add further, Your Honor, that counsel has indicated that testimony under Respondent's answer will be offered in a half day's time.

Examiner Royal: In Chicago?

Mr. Kolinski: In Chicago, shortly after the Commission's case has rested, and that may take place at the New York hearing, or very shortly after.

The issues in this case have called for the hearings which have taken place, and I am anxious to dispose of it when I see an early end in sight.

Examiner Royal: Very well. The adjournment will be as noted.

(Whereupon at 12:00 noon, October 2, 1937, the hearing in the above entitled matter was adjourned, to reconvene at 10:00 a. m., October 18, 1937, Room 500, 45 Broadway, New York City.)

468 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—2695) * *

416 Old Post Office Building, Philadelphia, Pa., November 15, 1937.

Met pursuant to adjournment at 2 o'clock p. m.

Before:

M. J. Furnas, Examiner.

Appearances:

P. C. Kolinski, Attorney for the Federal Trade Commission.

469 Examiner Furnas: Mr. Reporter, you will note that the hearing is convened and now in order. This hearing is reconvened by agreement and notice in the hearing of Docket No. 2695, at 2:10 o'clock p. m., in Room 416, Old Post Office Building, in Philadelphia, Federal Trade Commission versus Bunte Bros. Inc. The last hearing was held at St. Louis, Missouri, on the 2nd day of October, 1937. Mr. Reporter, you may note that counsel for the Commission, P. C. Kolinski, is present. The respondent is not represented by counsel.

Mr. Attorney, what is your further pleasure?

Mr. Kolinski: I may add for the record that respondent's counsel was not present at the last hearing, having filed a motion in opposition and objection to the holding of hearings outside of the state of respondent's domicile, the State of Illinois. As counsel has since indicated that he will not be present at hearings held outside of the State of Illinois, I now call Mr. William B. Hunt.

WILLIAM BENJAMIN HUNT was thereupon called as a witness on behalf of the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Examiner Furnas.

Q. What is your full name?

470 A. William Benjamin Hunt.

By Mr. Kolinski:

Q. Mr. Hunt, what is your occupation?

A. Sales manager of the Frank H. Fleer Corporation.

Q. What product does that company manufacture?

A. Chewing gum products.

Q. Where are those products sold?

A. We have a national sale. It is rather a general sale throughout the country.

Q. Through what type of outlets do you distribute?

A. We sell practically all of our products through jobbing outlets, which broken down are really grocery jobbers, confectionery jobbers, tobacco jobbers.

Q. And through what type of retail outlets is your product sold?

A. Since our main line is what is known as a penny line and only primarily sold to children, the type of store that ordinarily seeks our product is the small neighborhood store, frequently near schools where children congregate.

Q. Is your company's product sold in stores which sell confectionery products?

A. I believe it is safe to say that stores that handle our products handle other confectionery items. I never have found a store in which that was not true.

Q. What would you say is the situation as to
471 whether your chewing gum product is competitive with candy and confectionery products?

A. Our chewing gum products are directly competitive with other types of confectionery. In fact, as a children's product it is probably under more pressure than other types of chewing gum that are sold to adults. A youngster has a smaller quantity of free cash available for his or her purchases of candy, and it therefore follows that we are faced with considerable competition from other types of confectionery.

Q. Chewing gum is not listed as a confectionery in some reports which are issued to the trade by statisticians and others, is it?

A. I believe not. I believe it is listed as a separate survey of the Department of Commerce. Strictly speaking, it certainly should be classed as a confectionery item. It contains sugar, corn syrup and flavor, which are the main raw materials of all other confectionery items.

Q. About what percentage of sugar or syrup do some chewing gums contain?

A. Practically eighty per cent of chewing gum is made up of a combination of sugar, corn sugar and corn syrup.

Examiner Furnas: I believe you asked the witness, if I understood the question, what percentage of chewing gum is sugar.

472 The Witness: Of sugar itself?

Mr. Kolinski: Yes. I didn't think you understood it.

A. Sugar or syrup, they are all sugar. Glucose or corn syrup is a type of sugar.

By Mr. Kolinski:

Q. Are the sugars you use fully consumed by the chewer who uses chewing gum?

A. Yes, the sugars are solubles and dissolve rapidly in the mouth and are entirely consumed, leaving the residue or non-soluble portion, which is the actual chewing gum itself.

Q. It is consumed then in the sense that a food, an edible or a confectionery, would be consumed?

A. Exactly.

Q. How long have you been engaged in the chewing gum and confectionery industry?

A. I have been in the chewing gum business since January, 1930, and previous to that time, extending back to September, 1923, I was associated with Stephen F. Whitman Company in the confectionery business.

Q. In your two occupations you have been identified with what branches of the industry?

A. I have had experience in both manufacture and sales work.

473 Q. What is your present work?

A. My present work is strictly sales work, with the exception of the department of new pieces, which comes under the product department.

Q. In the course of your duties at the present time do you have occasion to study sales conditions generally throughout the United States?

A. Yes, that in fact is a very large part of my work.

Q. You are the sales manager of the Fleer Corporation?

A. That is right.

Q. And those studies include interviews, writing and observation of selling methods and distribution methods which involve the jobber, broker and the retailer?

A. That is right.

Q. You are generally familiar with the facts and figures concerning the distribution and consumption of candy throughout the United States?

A. It is a field in which the exact figures and an exact appraisal are rather difficult to secure, but one which I must necessarily keep in close contact with and analyze to the best of my individual ability.

Q. Are you familiar with the reports prepared annually by the United States Department of Commerce on confectionery products and distribution?

A. Yes, I am. I get it each year and try to de-
474 velop information from the tables in that report, but unfortunately have never been able to make very specific use of the material, since our branch of the business is hidden in a maze of other large companies.

Q. Mr. Hunt, what is your opinion as to the percentage of candies, either by volume or by dollar sales or both, which penny goods so-called comprise as related to the total candy consumption of this country?

A. I believe a conservative estimate would be twenty-five per cent of the total of candy sales to be strictly speaking penny goods.

Q. In your association with the confectionery field have you had occasion to become acquainted with a form of merchandising known as break and take assortment selling?

A. Yes, we frequently come in contact with this method of selling.

Q. I show you Commission Exhibit No. 1 and Commission Exhibit 2-a and 2-b in this case. Are you familiar with the type of assortment described on these exhibits?

A. Yes. This is a rather common type of break and take in which the flavor or, more strictly speaking, the color of a piece indicates the winners.

Q. There is no way for the consumer to know in advance which piece is the prize piece goods?

A. Probably not. The summer bar assortment I
475 see is made up of caramels, which if comparable at all to other products—not other products, but other packages of the same type, are wrapped in paper which is opaque enough so that the color of the piece is not recognized without unwrapping. With the chocolate-covered cream it is even more difficult to determine the color of the center.

Q. Do you consider such break and take method of selling a form of lottery selling?

A. It is a lottery selling, because whereas the price is set as a penny for each purchase there are opportunities to get more than a penny's value for the product's winner.

Q. Would you say that your company runs into such types of assortment frequently?

A. Yes, it is and has been a rather common method of marketing.

Q. Are there any seasons of the year in which such as-

sortments as evidenced by the particular exhibits here are more prevalent?

A. Although break and take packages have some demand all of the year round, the rate of sale accelerates at the end of the summer in anticipation of the school season, and it is during that period of the year that the stores that cater to the wants of children stock up on the items that children like.

Q. Do you know that the respondent in this case,
476 Bunte Bros. Inc. of Chicago, manufactures and sells assortments evidenced by these exhibits, in the State of Illinois?

A. Yes, I have heard that.

Q. Have you made a study of what possible effect such sales in the State of Illinois by the respondent, such break and take assortments, have on your sales in the State of Illinois?

A. Yes, we have tried to appraise the effect of break and takes on our products in the State of Illinois.

Q. Have you any figures on that?

A. Yes, we do have for the period extending from April, 1935, through to March, 1936.

Q. Have you figures that extend beginning April 1935, and running through the balance of 1935?

A. Yes, they are included in that.

Q. Did you in the year 1935 notice such seasonal trend of break and takes generally being sold in Illinois upon your sales in Illinois?

A. Yes, it was evident.

Q. And in what way did it affect business as respects your sales?

A. At a period of the year when we ordinarily would expect a greatly increased volume of sales we found that our actual sales were considerably under the sales for the same months in 1934. This is even worse when we
477 consider the fact that 1934 was considered as a poor business year for us.

Q. The figures you have are for 1935?

A. This is 1935. Our product, as I mentioned before, is sold primarily to children, and as a consequence we count on a greatly accelerated sale at the period that school opens, which is September first. On a percentage basis in the Chicago territory we found that our September, 1935, sales were only seventy-four per cent of our September, 1934, sales, while October, which ordinarily is a good month, was only sixty-two per cent of our October sales in 1934. Even though our sales did show increases

during several of the other months in 1935, this was to be expected since the average national sale in 1935 exceeded 1934. In the months that we sold less than in the corresponding months of the previous year it seemed logical to expect an increase under normal conditions. Does that answer your question?

Q. You have given the figures for what months?

A. September and October. Those are the vital months there, because it happens to be the time of the year when our sales are ordinarily good. We reversed the trend right at that time, which is most unusual.

Q. Your company's product is distributed to the consuming public, including school children, through the
478 same types of outlets which carry the penny break and take assortments?

A. Yes, probably in exactly the same outlets.

Q. And you ascribe this lowered sales volume in September and October, 1935, directly to the fact of break and takes being sold within the State of Illinois during those particular months?

A. Yes, I do. This is exactly what has happened in other markets where the same type of break and takes were being offered as well.

Q. You have made the studies then for the various sections of the country?

A. Yes, I have been the deviser.

Q. And the figures you have quoted here cover results as limited to the State of Illinois?

A. That is right.

Q. During the year 1935, is that right?

A. Yes, sir.

Q. Now, during the year 1935, the respondent marketed 40,000 units of the assortment marked Exhibit 2-a and 2-b, in the State of Illinois. By virtue of that fact would you ascribe some of your sales decline during the year 1935 to the fact that the respondent so marketed 40,000 units of that assortment?

A. Although it might not be fair to credit all of our decline to the sale of this one product, that was
479 recognized as one of the factors at the time, and in addition to causing the loss of actual sales tended to take the interest of the jobber and the retailer from our product at the time of the year when we were seeking broader distribution.

Q. Do you do a substantial volume of business that moves from the State of Pennsylvania to the State of Illinois?

A. Yes, in the period covered by this case, which is the year 1935, our sales in the metropolitan Chicago market alone amounted to $50,000 or more.

Mr. Kolinski: I have no further questions, your Honor. Have you anything?

Examiner Furnas: No, I think not. The witness will be excused.

IRVING C. SHAFFER was thereupon called as a witness on behalf of the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Kolinski.

Q. What business are you engaged in, Mr. Shaffer?
A. In the candy manufacturing business.
Q. With what company are you associated?
A. I am associated with Just-Born, Inc.
Q. Is that a Pennsylvania corporation?
480 A. No, they are a New York corporation doing business in the City of Bethlehem, State of Pennsylvania.
Q. What product do you manufacture?
A. We manufacture a general line of candies and chocolates.
Q. Where do you sell that product?
A. We sell it nationally.
Q. By nationally you mean—
A. Throughout the United States.
Q. And you sell to brokers and jobbers?
A. We sell to jobbers, chain stores and wholesale distributors.
Q. How long have you been identified with the candy industry?
A. For fifteen years.
Q. In what branches of the industry have you been identified?
A. I have been in the managing and executive end, the manufacturing end, and the maintenance end, and in the executive end is also included sales.
Q. And in connection with your selling duties have you had occasion to observe methods of selling that are prevalent on the part of retailers throughout the industry?
A. I have.
Q. And you keep yourself posted by way of con-

481 versations, lectures, statistics based on facts and figures concerning the candy industry?

A. At all times.

Q. What is your opinion as to whether chewing gum as marketed in this country is competitive with confectionery or not?

A. I believe that that is one hundred per cent competitive with candy.

Q. And it has been your observation that chewing gum is sold in all places where candies are sold?

A. Of course.

Q. And you have had occasion to see figures and reports given by the United States Department of Commerce on confectionery production and distribution?

A. I have, sir. In fact, we get the report every month.

Q. I will ask you your opinion as to what percentage of the total volume of candy, either by weight or by dollars, consumed in the United States annually, consists of penny candies?

A. It is my opinion that a minimum of twenty-five per cent of candies and chocolates that are made find their method of distribution through stores on the penny sale basis.

Q. In your observation of retail selling methods in the United States have you had occasion to familiarize
482 yourself with what are known as break and take assortments?

A. I have, yes, sir.

Q. I show you the Commission's Exhibit No. 1 and Commission's Exhibit 2-a and 2-b in this case, and ask you to study them. Have you seen assortments of that type?

A. It is the usual set-up on assortments of this type.

Q. You are familiar that under the portion of such assortment as displayed by the retailer to the consuming public the units are sold at one cent each, and out of one hundred sixty chocolate creams noted on the margin of Exhibit 2-b one hundred forty creams are vanilla creams being white centered items, and twenty creams are orange creams having orange centers; the purchaser who procures an orange cream procures in addition one of twenty assorted bars as a prize?

A. That is very obvious.

Q. And the purchaser of the last of one hundred sixty units receives a half pound box of chocolates?

A. That is the usual method of merchandising on this assortment.

Q. Do you have any objection to selling such assortments yourself?

A. I most certainly have. I have expressed myself very often at association meetings and group candy meetings that in merchandising this type of candy it makes
483 it next to impossible the merchandising of straight candy where the element of chance is not present. By virtue of this particular assortment the child for which it is in the main made has dangling before him a display of getting more for his penny than what he would ordinarily receive. Usually the opposite is true, because only fifteen per cent of the children that buy the candy are rewarded with a prize, and the other eighty-five per cent get less than what their penny would normally purchase for them.

Q. Do you feel that that involves gambling?

A. I most certainly am of that opinion.

Q. And has it been your observation that the sale of break and take assortments of that character has an effect upon the sale of straight candies?

A. Undoubtedly.

Q. And what is that effect?

A. Well, it prevents the sale of straight candy, inasmuch as the retailer having found that this type of assortment finds a ready sale with the children, whom we can now call customers, and which he finds he can turn over very readily and rapidly and still make the same margin of profit that he would on regular items, is very desirous of getting this type of goods. It is purely a matter of pennies or dollars and cents to him, and so when a straight box of merchandise is presented to
484 him he usually refuses it when he can go ahead and get a prize assortment such as this. We have had this particular experience in the State of Illinois. Our representative out there, Mr. Fink, who finding it rather difficult to sell our merchandise was constantly writing to the company when he was brought to task about the volume of his business, which has fallen to a very, very low ebb, wrote in stating that he wanted a break and take. He knew of our opposition, that we were unusually well situated, in view of the fact that we had just taken over a defunct concern which had a lot of wrapping materials that could be very easily converted into making break and takes, and said that he could show us a very, very substantial amount of business if we would only make this item up for him.

Q. When was this that Mr. Fink wrote in?

A. Mr. Fink was with us in 1935.

Q. And he made that request of you?

A. Several times. We refused the request because—well, we had known of the findings of the Supreme Court, we knew it was going to be against the law to make it, and we didn't care to get ourselves enmeshed or embroiled, and we had a feeling that sooner or later the Government would stop the practice, so that we might as well keep our skirts clean until this matter was definitely settled.

Q. What was your final decision?

485 A. The final decision was not to make the break and takes, and we finally withdrew from the market and we have not sold in the City of Chicago or the surrounding territory since that time.

Q. By withdrawing from the market you mean that you finally stopped selling straight candies in Illinois?

A. It was found to be unprofitable for my salesmen to travel with our line.

Q. From your contact with your salesmen and your observation of selling methods in this industry, do you find that the salesman who is seeking to sell straight goods is handicapped in areas where break and take assortments are prevalent?

A. There is no question about it in my mind, he certainly is handicapped, and his customers are constantly asking for the break and take assortments.

Q. That is true of the demands by the retailer upon the jobber, and in turn by the jobber upon the manufacturer's representative, is that right?

A. That is true, and you can carry that a step further, the manufacturer's representative upon the manufacturer.

Q. In the year 1935 the respondent in this case sold in the State of Illinois 40,000 units of the assortment represented by Exhibit 2-a and 2-b. Would such sale of such break and take assortment to the extent of

486 40,000 units in the State of Illinois be of such character as to help produce the handicap that you relate?

A. There is no question of that in my mind.

Q. What position do you hold with your company?

A. I am vice president and secretary of the Just-Born Company.

Q. And you are on the company's board of directors?

A. I am.

Q. And the decision to withdraw from the Illinois market was made by your company?

A. That is true.

Q. And, as you now testify, that decision was due to the fact that you did not desire to submit your straight goods in selling in Illinois to the handicap which is presented by a break and take assortment being sold in Illinois, which included some of the 40,000 break and take assortments called "Take-a-Flier" sold by the respondent in Illinois during 1935?

A. Well, of course, I do not know whether it was this particular assortment or some of this particular assortment, but the general condition in that territory was that the jobbers only wanted break and takes, and rather than submit to making break and takes we withdrew from the market.

Q. Your company then found that it would not
487 be profitable to attempt to sell your straight goods in Illinois faced by the demand which seemed to exist there and the prevalence thereof break and take assortments?

A. That is right.

Examiner Furnas: The witness is excused.

Mr. Kolinski: I will ask that this hearing be adjourned to Friday, November 19, 1937, at ten o'clock a. m., in Room 1123 New Post Office Building, Chicago, Illinois.

Examiner Furnas: Mr. Reporter, you will note that the hearing will now be adjourned in accordance with the statement just made by counsel for the Commission, to reconvene on November 19, 1937, in Room 1123, New Post Office Building, Chicago, Illinois, at ten o'clock a. m., Central Standard Time.

Is there anything further?

Mr. Kolinski: No, sir.

Examiner Furnas: You will note the hearing is now adjourned.

(Thereupon, at 3:00 p. m., November 15, 1937, the hearing in the above-entitled matter was adjourned.)

489 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—2695) * *

1123 New Post Office Building,
Chicago, Illinois,
Friday, November 19, 1937.

Met, pursuant to notice, at 10:45 o'clock a. m.

Before:

Miles J. Furnas, Examiner.

Appearances:

P. C. Kolinski, Attorney for the Federal Trade Commission.

LeRoy R. Krein, Attorney for the respondent, (105 West Adams Street, Chicago, Illinois.)

490 PROCEEDINGS:

Examiner Furnas: Mr. Reporter, you will note that this is a reconvening, by agreement and notice, of the hearing in Docket No. 2695, at 10:45 A. M., Friday, November 19, 1937, in Room 1123, New Post Office Building, Chicago, Illinois, Federal Trade Commission *vs.* Bunte Brothers, Incorporated. The last hearing was held at Philadelphia, on the 15th day of November, 1937.

Mr. Reporter, will you please note counsel for the Commission and also counsel for the respondent are present.

We will proceed with the hearing. What is your further pleasure, gentlemen?

Mr. Kolinski: There are several stipulations to be entered into with counsel this morning.

It is stipulated that parts of the report heretofore referred to of the United States Department of Commerce, entitled "Confectionery Production and Distribution 1935" may be introduced and admitted in evidence. Do you so agree, counsel?

Mr. Krein: Yes, I will agree to that, Mr. Kolinski, but you are going to have a big record if you are going to type that whole thing in as an exhibit.

Examiner Furnas: Off the record.

491 (Discussion off the record.)

Mr. Kolinski: There shall be considered as evidence in this case the following excerpts from this report, the first being Table 1 on page 3, which is as follows:

Table 1.—Sales of Confectionery and Competitive Chocolate Products by Types, 1934-35.

(402 identical manufacturers for each year)

1935 sales

Product	Number of firms	Quantity	Per cent of total quantity	Value
		Pounds		
Plain-package goods	226	141,119,378	10.0	$ 32,740,279
Fancy-package goods	81	14,364,325	1.0	9,842,625
Chocolate bulk confectionery	224	152,955,622	10.8	19,317,704
Bulk confectionery other than chocolate	258	313,263,713	22.2	31,282,331
Molded chocolate bars	44	153,951,605	10.9	29,372,605
Chocolate-covered bars	182	296,878,868	21.0	42,654,816
Other bars	143	31,432,779	2.2	4,696,892
5 and 10-cent packages other than bars	121	57,858,102	4.1	12,358,282
Penny goods	201	250,816,885	17.8	28,284,312
Total	[1]401	1,412,641,277	100.0	$210,549,796

[1] 2 firms combined in 1935.

492

1934 sales

Product	Number of firms	Quantity	Per cent of total quantity	Value
		Pounds		
Plain-package goods	219	119,298,598	9.0	$ 28,214,136
Fancy-package goods	98	14,316,069	1.1	10,314,539
Chocolate bulk confectionery	221	136,746,133	10.3	17,204,624
Bulk confectionery other than chocolate	240	291,861,204	22.1	29,127,154
Molded chocolate bars	49	132,124,584	10.0	24,521,311
Chocolate-covered bars	175	290,251,958	22.0	37,878,271
Other bars	113	26,303,660	2.0	3,850,016
5 and 10-cent packages other than bars	123	56,837,919	4.3	12,065,321
Penny goods	218	254,113,484	19.2	28,359,379
Total	402	1,321,853,609	100.0	$191,534,751

Mr. Kolinski: Also the paragraph entitled "Illinois" on page 22, which is as follows:

"Better conditions in general and easier money are the reasons given by one Illinois manufacturer for increased sales. Package re-design was given as one factor in the increased volume of package goods. Plain-package-goods sales in 1935 were up 33.6 per cent by quantity and 33.1 per cent in value over 1934.

493 "Although exact comparisons cannot be made, it is apparent that Illinois makes well over one-half of the chocolate-covered bars sold in the United States. The average value per pound of this item has moved steadily upward for the past 2 years, from 11.2 cents in 1933 to 12 cents in 1934 and then to 13.4 cents in 1935.

"In Illinois, the average value per pound of all products combined rose from 11.8 cents in 1934 to 12.5 cents in 1935. Every product separately shown shared in this increase with the exception of plain-package goods which showed no change, and 5-and 10-cent packages other than bars which dropped nearly 3 cents in average value. Sales of all products combined were up 2.1 per cent on a poundage basis and 8.6 per cent in dollar volume."

Also Table 35 on page 23 of this report, as follows:

494 Table 35.—Sales of Confectionery and Competitive Chocolate Products by Manufacturers Located in Illinois.

(Based on reports from 40 identical manufacturers)

Product	Number of firms	1935 sales: Quantity	1935 sales: Value	Average value per pound
		Pounds		
Plain-package goods	23	37,573,556	$ 5,471,906	$0.146
Chocolate bulk confectionery	22	40,226,909	4,580,296	.114
Bulk confectionery other than chocolate	26	91,895,606	8,322,568	.091
Chocolate-covered bars	15	186,871,527	25,025,680	.134
Bars other than cholocate and chocolate-covered	11	5,190,461	611,193	.118
5- and 10-cent packages other than bars	12	22,042,961	3,946,446	.179
Penny goods	22	34,695,814	4,174,836	.120
Other products[1]	2	1,184,162	412,102	....
Total	40	419,680,996	52,539,027	.125

1. Molded chocolate bars and fancy package goods combined to avoid disclosing the activities of individual firms.

495 1934 sales

Product	Number of firms	Quantity	Value	Average value per pound
		Pounds		
Plain-package goods	24	28,125,040	$ 4,110,763	$0.146
Chocolate bulk confectionery	22	39,920,207	4,289,450	.107
Bulk confectionery other than chocolate	26	87,788,232	7,640,611	.087
Chocolate-covered bars	14	190,722,885	22,913,994	.120
Bars other than chocolate and chocolate-covered	11	3,733,713	405,640	.109
5- and 10-cent packages other than bars	14	18,140,698	3,738,064	.206
Penny goods	21	40,764,978	4,794,481	.118
Other products	4	1,703,245	488,713	....
Total	40	410,898,998	48,381,716	.118

Mr. Kolinski: It is further stipulated and agreed that the Federal Trade Commission has to this date issued 127 orders to cease and desist against confectionery manufacturers, requiring them to cease shipping in interstate commerce candies and assortments of candies so packed as to involve distribution of same to the consumer by means of a chance, lottery or gift enterprise, that the number of such orders to cease and desist as of January 31, 1936, was 74.

Examiner Furnas: That statement is agreed to, is it?

496 Mr. Krein: I agree to that statement, but I object to the materiality or relevancy of it. My stipulation is simply not to object to the fact that certified copies of those orders are not produced. I reserve all objections on materiality and relevancy.

Examiner Furnas: Objection overruled.

Mr. Krein: Exception.

Examiner Furnas: Exception granted.

Mr. Kolinski: Mr. Examiner, in the course of transcription taken at various hearings some typographical errors crept in, which I have checked with counsel this morning, and I want on the record to note the corrections of such errors as they have appeared, being the following;

At page 7, line 19, question reading: "And approximately what is the annual profit of the industry?" should be corrected so as to read: "And approximately what is the annual volume of the product of the industry?"

At page 180, line 15, the word "intrastate" should be stricken and the word "interstate" substituted.

At page 319, line 25, the word "April" should be stricken and the word "June" substituted in lieu thereof.

At page 346, line 11, the phrase reading "than he is handling," the word "Than" should be stricken and in lieu thereof the word "that" inserted, so that the phrase will read "that he is handling."

497 Page 391, line 17, in the phrase reading "would almost buy" the word "almost" should be stricken and in lieu thereof the word "always" inserted, so the phrase will read, "Would always buy."

Page 396, line 9, the year "1937" should be stricken and in lieu thereof insert "1935."

Counsel, you have examined these corrections of errors and agree with the same?

Mr. Krein: That is correct.

Mr. Kolinski: Counsel has a stipulation to offer, if the Examiner please.

Examiner Furnas: Proceed.

Mr. Krein: It is stipulated by the parties hereto, by their respective counsel, that whenever the respondent manufactured and sold summer bar assortments which contained 20 prizes, consisting of assorted bars, that the assorted bars were not represented as being of the value of 5 cents; that only when 16 prizes were given was there any representation that the assorted bars were of a 5-cent value, and in the latter event the bars were of a retail value of 5 cents.

Mr. Kolinski: It is so stipulated.

Examiner Furnas: All right, gentlemen.

Mr. Kolinski: At this point, your Honor, the case for the Commission is rested.

498 Examiner Furnas: Mr. Reporter, will you note that the Commission rests?

Mr. Kolinski: Your Honor, following the conclusion of the hearing had in Chicago on July 27th, 1937, and subsequently by correspondence evidenced by counsel's letters dated October 7, and October 12th, it was understood that, except for the formal stipulation which now has been entered into, nothing further would be produced by the Commission at this contemplated hearing and that respondent would proceed with his case.

On November 6th, formal written order of the Commission fixing the time and place of the hearing on Novem-

ber 15th, 2:00 p. m., Philadelphia, Pennsylvania, and November 19th, 10:00 a. m., Chicago, Illinois, was mailed to respondent.

On November 16th, at 2:00 p. m., respondent's counsel, by special delivery air mail, mailed a letter addressed to myself at the Federal Trade Commission, in which counsel stated that it would be impossible for him to go ahead with the respondent's case on November 19, 1937, agreeing in the letter, however, to be present at this time and place for the purpose of the stipulation which has heretofore previously been entered into.

499 Now, I want to say to your Honor at this time that I feel there has been ample notice given respondent and its counsel of the time and place at which they might present proofs under their answer; the court is convened here; we are ready to go ahead with the hearing; the reporter is present; your Honor is present presiding; and I am here prepared to represent the Commission, and I want to put myself on record as opposing any motion of respondent's counsel to further adjournment of this hearing.

Mr. Krein: The respondent moves for a continuance at this time, your Honor.

The first official notice that definitely fixed this time and place was given on November 8th, 1937, received by me probably November 9th.

A brief of the respondent was due November 10th before the Federal Trade Commission in Docket No. 1811, and for some time prior to the 9th of November I had been working on the preparation of this brief. I was not able to get that done on the 10th and secured an extension from the Federal Trade Commission, granting me until the 20th. The brief was finished on the 16th and was mailed to the Commission. Up until the 16th I had been solely engaged in the preparation of this brief and in the law search incident thereto and was unable

500 to devote any time to the preparation of this case for the respondent.

On Monday, although I was engaged in the trial of another case, which was Case Number A346222 in the Municipal Court—

Examiner Furnas: That is Monday the 15th?

Mr. Krein: Monday the 15th. (Continuing.) —I did not object to the holding of a hearing in this matter in Philadelphia on said date, although it was impossible for me to be present, and counsel for the Commission knew

of my engagement, but there was no objection to that hearing, outside of the one previously filed with the Commission, because it was out of the state. Inasmuch as I did not feel that that hearing was authorized under the law and the rules, I did not object to their going ahead, even though I could not be there.

Mr. Kolinski: May I interrupt?

Mr. Krein: Yes.

Mr. Kolinski: You had no intention of being there, either, did you?

Mr. Krein: That is correct, I had no intention of being there. I am not saying that I think that it was proper that that hearing be held. I want to make it clear that my objections to that hearing still stand, on the
501 grounds that I do not think any hearing outside of Illinois is proper, but there is no objection to that hearing on the ground that I was engaged in another case, although those were the facts.

On Wednesday, November 17th, I had a final decree to be entered in a case which was continued at the last moment, although the decree was presented. The Case Number is 66838 in the United States District Court at Chicago. That decree also required considerable time.

The last several weeks I have been engaged in preparation for the trial of a case which was tried yesterday in the Probate Court of Cook County, challenging the jurisdiction of the Probate Court and the constitutionality of a part of the Probate Act, which we won. The case Number is 37-P-4074. That was yesterday, November 18th. That case required considerable time.

Being engaged in these other matters, I have not neglected, but I have been unable to devote any time to the securing of the necessary witnesses and the preparation of this defense here.

I might say that prior to this month I have been engaged in the trial of many cases and in the trial of Dockets Nos. 1811 and 2695. This is the first time, your Honor,
502 that the respondent has asked to put a case over, and it is the first continuance and I hope the only continuance I will ask for.

I think I will only need about two weeks. Oral arguments are set in Docket 1811 on the 29th, in case those are made, and I think they may be. There will be preparation necessary for that. I suggest this go over to the next week, the Monday following the 29th.

I might add that there will be a defense put in. This is not made for the purpose of delaying and stalling, and

I certify to that as a reputable attorney. There will be witnesses that are now out of town who will come to testify.

Examiner Furnas: About how many witnesses do you contemplate calling? Could you give us that?

Mr. Krein: I don't think it will require more than three hours. By reason of Mr. Kolinski not stipulating on this matter, it requires a certain amount of work getting some of the witnesses, but I don't think we will need more than three or four hours to put in our case.

Mr. Kolinski: May I interpose a question, counsel?

Mr. Krein: Surely.

Mr. Kolinski: Obviously you have been a very busy
503 practitioner. What reasons are there for not proceeding today?

Mr. Krein: The reasons I just stated. I have been unable to devote any time to it, and not only that, but my witnesses are out of town.

Mr. Kolinski: You have witnesses whom you would use today in support of the respondent's case who are not available?

Mr. Krein: I doubt even if they were available whether I could call them today. I have been unable to devote any time to the preparation of this matter. It has been impossible for me to do so.

Examiner Furnas: The Examiner has no desire to be unfair, to force a respondent into trial if he is not prepared. It did look this way to the Examiner; that there was ample notice given of this hearing and the Commission has gone to the expense of sending a couple of parties out here for the hearing.

Off the record, just a minute.

(Discussion off the record.)

Examiner Furnas: Mr. Reporter, you may note that this hearing will stand adjourned to reconvene on the 2nd day of December at 10:00 a. m., at a place to be designated by the Examiner not later than November the 24th.

504 The hearing is now adjourned.

(Thereupon, at 11:20 o'clock a. m., Friday, November 19, 1937, the hearing in the above entitled matter was adjourned.)

507 BEFORE THE FEDERAL TRADE COMMISSION.

* * * (Caption—2695) * *

1123, New Post Office Building,
Chicago, Illinois,
December 2, 1937.

Met, pursuant to notice, at 10 o'clock a. m.

Before:

W. W. Sheppard, Examiner.

Appearances:

Eugene Carmichael, Jr., Attorney for the Federal Trade Commission.

LeRoy R. Krein, Attorney for the Respondent, (105 W. Adams Street, Chicago, Illinois.)

508 PROCEEDINGS.

Examiner Sheppard: Are you ready to proceed, gentlemen?

Mr. Krein: Yes, sir.

Examiner Sheppard: All right. You can convene the hearing in the matter of Bunte Brothers, Docket No. 2695, ordered by the Commission to be heard before me in Chicago on this date, the 2nd of December, 1937, at 10 o'clock a. m., central standard time. The record may show I am substituting for Trial Examiner Miles J. Furnas, who is in charge of the matter and who has appeared in the other hearings in the case. Let the record also show Mr. Carmichael of the Chicago office appears as a substitute for Mr. Kolinski, the Commission's counsel in charge of the case. Let the record also show the appearance of Mr. LeRoy Krein, 105 West Adams Street, Chicago, appearing on behalf of the respondent.

Now, Mr. Krein, it is my understanding that this hearing is for the purpose of introducing testimony on behalf of the respondent. Am I right in that?

Mr. Krein: That is correct. Mr. Examiner, before I call my first witness, we will enter into this stipulation.

Examiner Sheppard: Just state it.

509 Mr. Carmichael: On page 436 of the transcript of testimony, line 20, appears the year "1933," which is a typographical error. The year should have been "1923." I have asked counsel for the respondent to stipu-

late to this correction and he agreed to do so. Is that right, Mr. Krein?

Mr. Krein: That is correct.

Examiner Sheppard: All right, then, the stipulation may be received and the correction noted. Now, we are ready for whatever testimony you have, Mr. Krein.

Mr. Krein: I will call Mr. Cline.

Examiner Sheppard: Your name?

Mr. Cline: E. W. Cline.

Examiner Sheppard: Your address?

Mr. Cline: Business address, 3301 Franklin Boulevard.

Examiner Sheppard; Now, sir, hold up your right hand and be sworn.

E. W. CLINE was thereupon called as a witness on behalf of the respondent, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Krein.

Q. What is your name?

A. E. W. Cline.

510 Q. Where are you employed?

A. With Bunte Brothers, Chicago.

Q. What is your position?

A. Sales manager.

Q. How long have you held that position?

A. Since January 1, 1933.

Q. And what was your experience prior to that time?

A. Prior to that time I was assistant sales manager.

Q. For the respondent?

A. Yes.

Q. How long have you had that position?

A. From the year 1919 to 1933.

Q. Prior to 1919, what position did you hold?

A. I was in the city sales department of Bunte Brothers from 1912 to 1919, pardon me, from 1912 until, I went into the army in May, 1918, I believe, and I came back with Bunte Brothers after the war.

Q. Outside of that one interval from 1912 to the present, you have been associated with the respondent, is that correct?

A. Yes.

Q. Your present position, what duties does that involve?

A. I am in charge of salesmen and responsible for the sales.

Q. Do the salesmen make reports to you?

511 A. Yes, they do.

Q. How often?

A. They make daily reports.

Q. These salesmen are they—what territory do they cover?

A. Our salesmen cover the entire United States, that is, our sales force.

Q. Do you make any personal contacts with distributors including jobbers and large retailers?

A. Yes.

Q. Prior to your present position as assistant sales managers, what duties did that position involve?

A. Assisting the sales manager in making contacts with distributors and large accounts.

Q. Would you say from your experience that you have been acquainted for approximately twenty-five or twenty-six years closely with the rental distributors of candy in the United States?

A. Yes.

Q. That contact has been personal contact as well as contact through the documents furnished you by persons whom you supervise?

A. That is right.

Q. From your knowledge and observation in the candy industry, have you become acquainted with break-and-

512 take assortments?

A. Yes, sir.

Q. The respondent manufactures break-and-take assortments?

A. Yes.

Q. Are there varieties of break-and-take assortments in Illinois other than those manufactured by the respondent?

A. Yes, there are several.

Q. Is it true that local jobbers and retailers also make up their own break-and-take assortments?

A. Yes.

Q. How is that possible? Describe the process?

A. Well, that is possible by the jobber being able to purchase the penny pieces and then assembling his own bars to make a complete unit.

By Examiner Sheppard:

Q. Where does he get the boxes? Does he buy them on his own?

A. Yes, he buys his own boxes.

By Mr. Krein:

Q. If a cease and desist order issues in this case preventing the respondent from manufacturing and selling in Illinois break-and-take assortments, do you believe the respondent will be able to maintain its volume?

A. Yes.

Q. How?

513 A. By coming out with new items and going after the sale of those items more aggressively.

Q. Do you believe if a cease and desist order issues in this case there will be less break-and-takes sold in Illinois?

A. No.

Q. In other words, you feel that persons who formerly purchased Bunte Break-and-takes will then purchase those of the other manufacturers?

A. Yes, sir.

Q. Do you believe that the volume of the sales obtained by pushing new items will come out of the break-and-take volume?

A. No.

Q. Is it your opinion that as long as you have break-and-takes obtainable by retailers in Illinois the volume of break-and-takes will remain the same?

A. Yes.

Q. And that if one manufacturer is eliminated the retailers will purchase such assortment manufactured by others?

A. That is my opinion.

Q. Will you describe in your own words what is the basis of that opinion? In other words, is it the particular break-and-takes that retailers are attracted to or the brand of the break-and-take or just why would you say the volume would remain the same?

514 A. There is a demand on the part of the retailer for break-and-takes and in the event we do not put out the break-and-takes, these other manufacturers will supply that demand.

Q. Do you believe there will always be break-and-takes in Illinois?

A. Yes.

Q. Do you think that cease and desist orders are effective remedies?

A. No, I do not believe they are, because there are too many manufacturers.

Q. Describe in your own words. Can you expand that any more?

A. Well, if a cease and desist order is issued against us these other manufacturers will continue to put out draws and others that are not putting out draws at the present time might start making them.

Q. What if those are enjoined?

A. Then others will start making draws.

Q. It is possible for break-and-takes to enter both from others states and from inside the state, is that correct?

A. Yes.

Q. In other words, companies will spring up making these break-and-takes, and if they are enjoined others will spring up?

515 A. That is right.

Q. So as long as in your opinion you believe there is a demand you will always have break-and-takes?

A. Yes.

By Examiner Sheppard:

Q. Do you have any idea how many competitors you have in the state in the break-and-takes?

A. No, I have no idea, but there are several.

Q. Several?

A. If you would call on these jobbers, you will find numerous break-and-takes.

Q. Do other manufacturers of break-and-takes outside of the state sell their goods in here?

A. Yes.

Examiner Sheppard: All right, Mr. Krein.

By Mr. Krein:

Q. Mr. Cline, what percentage do you believe that break-and-take volume is to be total penny goods volume in the candy industry?

A. In my opinion the break-and-take business is 10 per cent or less of the penny goods volume.

Q. Did the respondent stop manufacturing and selling break-and-takes in Illinois during the NRA?

A. No.

Q. They were always obtainable in Illinois?

516 A. Yes.

Q. For the sake of the record, Mr. Cline, from your knowledge, experience and observation, will you give us your opinion as to the position of Chicago and its immediate vicinity with reference to the candy industry?

A. Chicago is now considered the candy manufacturing center of the country, that is, the largest volume of candy is manufactured here.

Examiner Sheppard: I didn't know that.

By Mr. Krein:

Q. What were the former centers?

A. Well, formerly the eastern markets, such as Boston, and New York were the candy manufacturing centers, that is, doing the largest volume.

By Examiner Sheppard:

Q. How long has Chicago been that?

A. Well, I would say that change has taken place during the last 20 years.

Examiner Sheppard: Well, that is quite interesting. I didn't know that.

By Mr. Krein:

Q. Let me ask you this, Mr. Cline, do you believe that if all break-and-take candies were eliminated, let's assume we can eliminate all break-and-takes, do you think that same volume that was done on the break-and-takes
517 would now go to straight candy?

A. No, I do not believe all that volume would go to straight candy.

Q. Why?

A. Because I do feel many sales are now made, children buy break-and-takes on impulse, and then we have competition from other lines other than candy, for instance, with the lucky sticks on ice cream, things of that kind.

Q. Do you feel that a child spending pennies on break-and-take candy, if that break-and-take were eliminated, would have spent those pennies on other types of candy?

A. I do not believe they would in all cases.

Q. Have you any idea what percentage you think the break-and-take volume is stimulated by its own principle?

Mr. Carmichael: Mr. Examiner, if I might just interpose here, I am not certain this witness is qualified to answer that question as to the preference of children with their pennies and just where this purchasing power would go.

Examiner Sheppard: I think he answered as fairly as he could, he did not think all would. I don't know what other answer he could make to it. I will let the record stay as it is. Proceed.

Mr. Krein: What was the last question?

(Question read as above recorded.)

518 By Mr. Krein:

Q. Do you understand the question?

A. Yes. In my opinion I believe about 50 per cent of the volume is stimulated.

Q. In other words, you feel if break-and-takes were

eliminated; or we are assuming that that is possible, if break-and-takes were eliminated, only 50 per cent of that volume would go the straight candy industry?

A. Yes, that is my opinion.

Q. Have you seen, observed, or known of children who have done odd jobs or have saved money to purchase these sorts of candies that they probably would not have to purchase straight candies? If you don't know—

A. I don't know as to that.

Q. Just one more question. Do you believe that the volume of candy is a stagnant volume, or do you believe that the volume can change by the introduction of new bars, new items?

A. Yes, I believe it can by the odoption of new items.

Q. Will you describe in your own words if you want to explain that any further?

A. The retailer is handling a certain line of merchandise and he handles it year in and year out. When a manufacturer comes out with a new piece that tickles the palate and appeals to the children or to the grown-ups, nat-
519 urally there is an increased demand for that item and that stimulates the business in that item, while, on the other hand, the consumer may have tired of these same items the retailer had in his case.

Q. Do you feel the consumer will spend more money for candy or just buy that product instead of something else?

A. I feel candy is sold on impulse and if the consumer sees a piece that looks good to him, tickles his palate, something new, he is going to buy it.

Q. You didn't answer that question. Do you think he will buy that instead of something else or buy more of it? In other words, will the volume of candy increase or stay the same?

A. The volume of candy should increase.

Mr. Krein: I think that is all.

Examiner Sheppard: Cross examine.

Cross-Examination by Mr. Carmichael.

Q. Mr. Cline, about how many retail outlets in Illinois would you say handle Bunte products for sale?

A. I do not know.

Mr. Krein: That is in the record, Mr. Carmichael.

By Mr. Carmichael:

Q. Would you say about 50 per cent?

A. I do not know as to that.

520 Q. Do you know how many jobbers in Illinois handle Bunte Brothers products?

A. I would say 95 per cent of the jobbers in the State of Illinois handle some products of Bunte's.

Q. Can you state approximately the number of units of Tak-a-Flyer assortments that were sold by Bunte in Illinois in 1935?

A. No, I could not tell you.

Q. Or 1936?

A. No, sir.

Mr. Krein: That is in the record.

Mr. Carmichael: It is in the record, but I am leading up to a question.

By Mr. Carmichael:

Q. You employ 16 full-time salesmen in Illinois?

A. Yes.

Q. Wouldn't you say that Bunte Brothers is the largest seller of break-and-takes in Illinois, the largest individual seller?

A. No, I would not.

Mr. Krein: I don't think the witness is competent. I don't think he is familiar with the figures of other companies, even with those that they had presented for comparison.

Examiner Sheppard: Anything you don't know, 521 just answer that you don't know.

A. Well, I do not know.

By Mr. Carmichael:

Q. You would say, though, wouldn't you, that it obtains a substantial portion of that business?

A. I could not answer that either.

Q. Why is it if you could increase your actual sales as you have testified without the break-and-takes, why don't you bring out those new items now and do so?

A. Well, there is a nice volume on the break-and-takes and they are being put out, and we are manufacturing them.

Q. Why wouldn't the sales of new items come out of the break-and-take volume? Will you clear that up a little?

A. Because, in my opinion, there is a certain percentage of sales on break-and-takes, and there always will be.

Q. But you have testified you could bring out new items if a cease and desists order were issued against you, equal or surpass your preent business, where would

this purchasing power come from, especially on penny items?

A. In my opinion, we would be taking that business away from our competitors on straight merchandise and not out of the draw business.

Q. Do you think you could take it away from competitors selling break-and-take penny items?

A. No.

522 Q. Where would you take the business from?

A. As I said before, we would take it from the straight sales of penny goods, not break-and-takes.

Q. There are a great many good sized candy manufacturers located outside of Illinois who are shipping and selling candy into Illinois, are there not?

A. Yes.

Q. There is Whitman, is that right?

A. Yes.

Q. Henry Heide Company?

A. Yes, sir.

Q. New England Confectionery Company?

A. Yes.

Q. Lovell & Covel Company, Cambridge, Massachusetts?

A. Yes.

Q. Fox Cross Candy Company?

A. Yes.

Q. And Frank H. Fleur Company?

A. Yes.

Q. Pecheur Lozenge Company?

A. Yes.

Q. F. M. Paist and H. B. Reese?

A. Yes.

Q. And D. L. Clark Company?

A. Yes.

523 Q. To name some of them.

A. Yes.

Q. These manufacturers are all of good size, are they not, or at least most of them?

A. Well, they are all well-known concerns.

Q. So you cannot say that either Bunte Brothers or the Chicago manufacturers have a natural monopoly on the Illinois business?

A. No, they haven't.

Q. Just one more question. I want you to explain a little more clearly why if all break-and-takes were eliminated that 50 per cent of the volume would go to straight candy, as you said, and only 50 per cent?

A. In my opinion 50 per cent of the children buy the break-and-take because they are attracted by that particular package and I believe about that percentage would buy other items.

Q. Because they have an opportunity to win a larger package?

A. That particular style of package appeals to them.

Q. Don't you think that encourages the gambling instinct in children?

A. Well, I don't know.

Q. What would you think if you were to give an opinion?

Mr. Krein: I think the witness answered.

524 By Examiner Sheppard:

Q. Do you have anything else to offer on that?

A. No.

Examiner Sheppard: All right.

Mr. Carmichael: That is all.

Examiner Sheppard: Anything else?

Mr. Krein: That is the only witness I have for today. Mr. Ferdinand Bunte, who has testified here before, he was called by the commission, is out of town on business and I understand he won't get back until when, Mr. Cline?

The Witness: I believe he will be back about the 15th of January.

By Mr. Krein:

Q. Where is he now?

A. In Texas.

Q. Is he going to be that far away all the time?

A. Well, he may. From there he is probably going over to Florida. I am not sure.

Mr. Krein: I would like to have opportunity to put in some testimony by Mr. Ferdinand Bunte. I would like to ask at this time the hearing be adjourned until he comes back. That is about the middle of January.

Mr. Carmichael: Off the record.

525 (Discussion had outside of the record.)

Examiner Sheppard: On the record. Well, gentlemen, you both know this is not my case, I don't know the status of it, and I am not going to close it now. If you are finished at this time, this is your only witness, I will take an adjournment on five days notice so the regular examiner, Mr. Furnas, can take what disposition he wants. If there is any further hearing, Mr. Krein, for the purpose of more testimony on behalf of the respondent, you can take it up with the regular Examiner, Mr. Furnas.

Mr. Krein: He will see my request in here before he closes it, is that correct?

Examiner Sheppard: I presume he will. He will read this record. You said something about another witness in January.

Mr. Krein: Mr. Bunte, who has been previously called for this purpose.

Examiner Sheppard: I don't know whether the Examiner, Mr. Furnas, will be willing to wait that long, but that is a question for him to decide, not me. So I shall adjourn the hearing—

Mr. Krein: For the sake of the record, I can state that will be our only witness and in case Mr. Furnas will
526 deny the request he can close the case and I will file exceptions with the Commission as far as that goes.

Examiner Sheppard: I presume the only question with Mr. Furnas will be the weight of Mr. Bunte's testimony in reference to holding up the case that long, but as I say that is a matter for him to determine, and I am going to take an adjournment in this case now on five-day notice to be reconvened by the Examiner in charge whenever he sees fit.

(Thereupon, at 10:30 a. m., December 2, 1937, the hearing in the above-entitled matter was adjourned.)

527 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—2695) * *

ORDER CLOSING TAKING OF TESTIMONY.

The taking of testimony in the above entitled proceeding is closed as of this date.

Respectfully,

Miles J. Furnas,

Trial Examiner.

MJF:he

February 14, 1938.

528 COMMISSION'S EXHIBIT NO. 1.

Summer Bar Assortment
Contents:
160—Caramels
16—Chocolate Caramels
144—Vanilla Caramels
16—5c Assorted Bars
1—25c Box Candy
Exhibit 1.

Interview with Cohn. File D. 1811. Date.....
Auding Attorney. Federal Trade Commission.

529 COMMISSION'S EXHIBIT NO. 2-A.

End of box:
160 Net Count 1 For 1c 160 Net Count
Ta-Ka Flyer Bar Assortment
Bunte Brothers Chicago, U. S. A

530 COMMISSION'S EXHIBIT NO. 2-B.

Ta-Ka Flyer Bar Assortment
Contents:
160—Chocolate Creams
140—Vanilla Creams
20—Orange Creams
20—Assorted Bars
1—½ lb. Box Chocolates

531 UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 6th day of September, A. D. 1938.

Commissioners:

Garland S. Ferguson, Chairman,
Charles H. March,
Ewin L. Davis,
William A. Ayres,
Robert E. Freer.

* * (Caption—2695) * *

ORDER DENYING MOTION TO DISMISS COMPLAINT.

This matter coming on to be heard by the Commission upon the motion filed herein on March 23, 1938, by Bunte Bros., Inc., respondent herein, to dismiss the complaint heretofore issued on January 29, 1936, and the Commission having duly considered the said motion, and being now fully advised in the premises;

It Is Ordered that the motion to dismiss the complaint be, and the same hereby is, denied.

By the Commission.

Otis B. Johnson,
Secretary.

(Seal)

Filed Sept. 7, 1938. 532

UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 7th day of September, A. D. 1938.

Commissioners:

Garland S. Ferguson, Chairman,
Charles H. March,
Ewin L. Davis,
William A. Ayres,
Robert E. Freer.

* * (Caption—2695) * *

FINDINGS AS TO THE FACTS AND CONCLUSION.

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on January 29, 1936, issued and served its complaint in this proceeding upon respondent, Bunte Brothers, Inc., charging it with the use of unfair methods of competition in commerce, in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondent's answer thereto, testimony and other evidence in support of the allegations of said complaint were introduced by P. C. Kolinski, attorney for the Commission, and in opposition to the allegations of the complaint by Samuel G. Clawson and L. R. Krein, attorneys for the respondent, before Miles J. Furnas, Irving D. Royal, and W. W. Sheppard, examiners for the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final hearing before the Commission on the said complaint, the answer thereto, testimony and other evidence, briefs in support of the complaint and in opposition thereto, and the oral arguments of counsel aforesaid; and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom:

Findings as to the Facts.

Paragraph One: Respondent is a corporation, organized in 1903, existing and doing business under the laws of the State of Illinois, with its principal office and place of business located at 3301 Franklin Boulevard, Chicago, Illinois. It is now, and for several years last past has been, engaged in the manufacture of candies and in
533 the sale and distribution thereof to wholesale dealers, jobbers, and retail dealers located in the various states of the United States, and particularly in the State of Illinois.

Paragraph Two: The candy industry in the United States represents a capital investment of approximately $150,000,000.00, with the annual dollar volume of the product of the industry exceeding the sum of $250,000,000.00. The greater part of this product is referred to in the candy trade as "straight merchandise" or "straight goods." The term "straight goods" is used to describe those products which are normally sold at a stated price per unit, and not sold, or designed to be sold, to consumers under any plan constituting a lottery or involving an element of chance. Some "straight goods" are nationally advertised so as to create a consumer demand for them, which gives rise to a defined current of commerce throughout the several states of the United States from the states of manufacture of such nationally advertised candy. Respondent, in the conduct of its business, is in competition with other corporations and with individuals and partnerships, located in various states of the United States other than the State of Illinois, that are engaged in the manufacture, sale, and distribution of candies and confections in commerce between and among the various states of the United States, and particularly from the states in which said products are manufactured to the State of Illinois.

Some of the product of the industry is sold in assortments involving the use of chance in the sale and distribution thereof to the ultimate purchasers or consumers. Such chance assortments are variously referred to in the industry as "break and take", "draw," or "deal" assortments. While they may vary in minor detail, all of them operate under the principle of making the amount of return to the purchaser dependent upon chance. The sale, in interstate commerce, of such assortments involving chance has been declared unlawful by the Supreme Court of the United States, and at the time testimony

was closed in this proceeding there were outstanding, against one hundred and twenty-seven (127) competitors of respondent, orders requiring them to cease and desist from the use of such methods in connection with their sales in interstate commerce.

Paragraph Three: In the course and conduct of its business, respondent sells to dealers in the State of Illinois certain assortments involving the use of chance in the sale and distribution thereof to ultimate purchasers. One of these assortments is composed of a number of wrapped caramels of uniform size, shape, and quality, a number of larger pieces of candy, and a box of candy, which larger pieces and box of candy are to be given as prizes to purchasers of certain of the caramels in the following manner:

The majority of the caramels in the assortment have the same color, but a small number of them have a different color. All of the caramels of uniform size, shape and quality in the assortment retail at the price of one cent each; but every purchaser who procures one of the caramels having a color different from the majority in the assortment is entitled to receive, and is given, without additional charge, one of the larger pieces of candy heretofore referred to. The purchaser of the last piece of caramel candy of uniform size, shape, and quality in each assortment is entitled to receive, and is given, with-
534 out additional charge, a box of candy. The color of the caramels is effectively concealed from purchasers and prospective purchasers until a selection has been made and the wrapper removed. The purchaser of said caramels who procures one having a color different from the majority in the assortment thus obtains one of the larger pieces of candy wholly by lot or chance.

This assortment was sold to the candy trade in Illinois during the summer months of the year 1935, and was designated "Summer Bar Assortment." It is a chance assortment known as "break and take", and was so identified by respondent. While it varies from the assortment described in the complaint in the particular concerning the last prize, it is nevertheless identical in principle, and was so admitted by respondent.

Respondent also manufactures, and distributes in the State of Illinois, another chance assortment designated as "Ta-Ka Flyer Bar Assortment." Its principle of sale and distribution is the same as that of the assortment described in the complaint, and it was so identified by the respondent. It is a chance assortment of the type

known as "break and take," consisting of 160 pieces of candy, of which 20 have differently colored centers. The units with differently colored centers are used to identify winners of prizes; in other words, the purchaser procuring a unit with a differently colored center receives one of the larger pieces of candy as a prize, without additional charge. The units are sold to ultimate purchasers at the price of one cent each. Respondent's volume of sales of its "Ta-Ka Flyer Bar Assortment" in the State of Illinois was 40,000 assortments in 1935, and 86,000 assortments in 1936.

The above described chance assortments were distributed to 95% of the candy jobbers in the State of Illinois through the services of sixteen full-time salesmen employed by respondent, during the years 1935 and 1936. The dollar volume of respondent's sales of penny candies in Illinois in 1935 was $275,400. In 1936 it was $314,400, of which the chance assortments of the "break and take" variety constituted approximately 23%. Such "break and take" assortments are distributed by jobbers to retail dealers, so that they may be seen practically wherever candy is sold in the State of Illinois.

Paragraph Four: The above described assortments are assembled and packed by respondent in such a manner that they may be used by retail dealers for sale and distribution to the public by lot or chance without alteration or rearrangement. Respondent has knowledge that the candy packed in such assortments will be sold to the consuming public by retail dealers by lot or chance. The retail dealers to whom said assortments are sold and distributed expose the same for sale, and sell the candy to the purchasing public in accordance with the above described sales plan.

Paragraph Five: Respondent's above described assortments are sold and distributed by many retail dealers located in the vicinity of schools, and they attract the patronage of school children. School children purchase candies from the "break and take" assortments in preference to buying "straight candies," because of the chance or gaming feature connected with the "break and take" assortment. Advertising methods are used to stimulate such demand among children. Witnesses from the candy industry, comprising manufacturers, salesmen, jobbers, and retailers, testified that the sale of such "break and take" assortment teaches and encourages gambling among children, who comprise the principal purchasers and consumers of candy sold in this manner.

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Paragraph Six: Candies so packed as to involve the element of chance in their sale and distribution are in direct competition with candies so packed as to be sold only as straight goods, and are so displayed to prospective customers. All candies are sold through the same type of merchandising channels. Jobbers who handle chance assortments also handle straight goods. Many retail dealers prefer to buy all of their candies from one jobber because of the convenience of dealing with only one salesman, one order blank and one bill to be paid. Such retail dealers who desire chance assortments will, therefore, buy all of their candy requirements from a jobber who sells chance assortments.

Paragraph Seven: The representatives of 48 candy manufacturers, with plants located in 13 other states of the United States and shipping in excess of an annual volume of $1,440,000 of straight candies from their plants to the State of Illinois, found that their failure to carry chance assortments, particularly of the "break and take" type, has been, and is, a decided handicap in securing business in the State of Illinois. Some of these representatives had called on dealers who needed "straight candies" for their stock of merchandise and who would have purchased the "straight goods" offered for sale by these representatives, but because such dealers also desired chance assortments and preferred to give the whole order to one salesman, it was impossible to sell anything to them.

Representatives of the above mentioned candy manufacturers located outside of the State of Illinois discovered that a salesman who can offer chance assortments of candy has a tremendous advantage in soliciting business from jobbers over one who does not have such chance assortments. This was variously described as a "leeway", an "advantage", and an "in". Ability to display a chance assortment creates advantage in many ways. Often the offer of a chance assortment to a jobber will attract interest that otherwise does not exist, and will act as a "door opener" or an "order opener." Having interested the jobber and sold him chance assortments, the jobber will then add to the same order his requirements of straight goods, because of the convenience of one shipment.

Paragraph Eight: The sale of straight candy is adversely affected by the sale of chance assortments of candy in Illinois, particularly of the break and take variety.

This adverse effect was shown by a reduction in the volume of straight goods sold in Illinois.

Some out-of-state manufacturers experienced a marked decrease in their sales of straight goods in Illinois at times when the sale of chance assortments, particularly of the break and take variety, was active in Illinois. A representative of a New York manufacturer suffered a marked decline in his sales of straight candies in the Illinois market in May and June of 1935 over sales of straight candies in the same market in May and June of 1934. The sale of chance assortments of the break and take variety was particularly active in Illinois in May and June of 1935. The sales of a Pennsylvania manufacturer of a competing confection, chewing gum, in Illinois in September and October of 1935 were but 74% and 62%,
535 respectively, of his sales in the same market during the same months in 1934. The sale of chance assortments of candies, particularly of the break and take variety, was very active in Illinois during September and October, 1935, far more so than during the same months in 1934. The presence in the Illinois market of 40,000 of respondent's break and take chance assortments during the year 1935 was a strong factor contributing to the sales declines these interstate competitors of respondent suffered. A New York manufacturer was repeatedly asked by his Chicago sales representative to distribute a chance assortment of the break and take variety, but he felt under a moral compulsion not to resort to such practices. Rather than indulge in the same, he withdrew entirely from the Illinois market.

A competitor of respondent, located in the State of Wisconsin, who had been ordered by this Commission to cease and desist from selling break and take candy assortments in interstate commerce, within a four months period following the date of such order, suffered an 80% reduction of sales in Illinois from the $60,000 volume rate of the preceding year. This Wisconsin competitor's telephone and telegraph expense to Illinois had declined, advertising expense to the state had been cut $150, and the company had discontinued one of its Illinois salesmen. The Illinois business of another Wisconsin competitor of respondent, who had been doing an annual volume of $100,000 of candy business in Illinois, and against whom the Commission had issued a similar order, was adversely affected 20%. These particular competitors are located within 100 miles of the Illinois market, and their loss of business is due directly to the pres-

ence of break and take candy in the Illinois candy market.

Paragraph Nine: Respondent's competitors from other states would be placed on an equal competitive basis if respondent ceased the sale and distribution of chance assortments in Illinois. A substantial portion at least of the people who now buy candies from chance assortments would purchase candy of some kind, regardless of the method of sale and distribution, so that absence of chance assortments would result in an increase in the total volume of business done in straight candies.

Paragraph Ten: Respondent's sale and distribution of "break and take" candy assortments as set forth in these findings is a lottery scheme, game of chance, or gambling method. It encourages gambling among children, who are enticed by the element of chance to purchase candy thus sold in preference to straight candy. Respondent's use of such method in the sale and distribution of its candies has the capacity and tendency to, and did and does, divert trade and custom to itself from its competitors who sell and distribute only straight candies; it has the capacity and tendency to, and in some cases did and does, exclude from the Illinois market competitors who are unwilling to use the chance assortment method in the sale and distribution of their candies or who are restrained from so doing; and it has the capacity and tendency to create in respondent a monopoly of the Illinois candy trade.

Respondent's use of chance assortments in the sale and distribution of its candies in Illinois has a direct and powerful burdensome effect upon interstate commerce in candies from other states to the States of Illinois, 536 and gives respondent an undue and unreasonable preference over competitors located in other states, in that it:

(a) Reduces the amount of business in straight candies that may be competed for by manufacturers in other states by the amount that chance assortments detract from the sale of straight goods to ultimate purchasers or consumers.

(b) Eliminates from interstate competition all sales of straight candies to dealers who desire chance assortments and who prefer to buy their chance assortments and straight goods from a single salesman in one lot.

(c) Secures for respondent sympathetic access to prospective purchasers denied to its competitors from other states.

(d) Secures for respondent orders for straight candies from dealers who have purchased its chance assortments and who, to fill out a sizeable order, for convenient shipment, or for other reasons, will add thereto their requirements of straight candies.

Conclusion.

The aforesaid acts and practices of respondent, Bunte Brothers, Inc., are all to the prejudice of the public and of respondent's competitors, and constitute unfair methods of competition within the intent and meaning of the Federal Trade Commission Act.

By the Commission.

Garland S. Ferguson,
Chairman.

(Seal)

Dated this 7th day of September, A. D. 1938.

Attest:
Otis B. Johnson,
Secretary.

537 UNITED STATES OF AMERICA.

Entered Sept. 7, 1938.

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 7th day of September, A. D. 1938.

Commissioners:

Garland S. Ferguson, Chairman.
Charles H. March.
Ewin L. Davis.
William A. Ayres.
Robert E. Freer.

* * (Caption—2695) * *

ORDER TO CEASE AND DESIST.

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the answer of respondent, testimony and other evidence taken before an examiner of the Commission theretofore duly

designated by it in support of the allegations of said complaint and in opposition thereto, briefs filed herein, and oral arguments by P. C. Kolinski, Counsel for the Commission, and by L. R. Krein, Counsel for the respondent, and the Commission having made its findings as to the facts and conclusion that said respondent has violated the provisions of the Federal Trade Commission Act:

It Is Ordered that the respondent, Bunte Brothers, Inc., a corporation, its officers, directors, agents, representatives and employees, in the offering for sale, sale and distribution of candy, in the State of Illinois, do cease and desist from:

(1) Selling and distributing to dealers candy or other confections so packed and assembled that sales of such candy or other confections to the general public are to be made or may be made by means of a lottery, gaming device or gift enterprise;

(2) Supplying to or placing in the hands of dealers assortments of candy or other confections which are used or which may be used without alteration or rearrangement of the contents of such packages or assortments to conduct a lottery, game of chance or gift enterprise in the sale and distribution of candy or other confections contained in said assortments;

(3) Packing or assembling in the same assortment of candy for sale to the public at retail, pieces of candy of uniform size and shape with different colored centers, together with larger pieces of candy, which said larger
538 pieces of candy are to be given as prizes to the purchasers procuring pieces of candy with centers of particular colors.

It Is Further Ordered that the respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

By the Commission.

Otis B. Johnson,
Secretary.

(Seal)

539 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—2695) * *

EXCEPTION.

Now comes the Respondent, Bunte Brothers, Inc., by Samuel G. Clawson, its attorney, and respectfully excepts to the Order entered by this Honorable Commission in the above entitled proceeding on September 6, 1938 denying the Motion of the Respondent to dismiss the Complaint herein, and further excepts to the Cease and Desist Order entered herein on September 7, 1938.

Bunte Brothers, Inc.,
By: /s/ Samuel G. Clawson,
Its attorney,
105 West Adams Street,
Chicago, Illinois.

Dated: September 16, 1938.

540 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—2695) * *

I, Otis B. Johnson, secretary of the Federal Trade Commission, do hereby certify that transmitted herewith is a full, true, and complete transcript of proceedings had before the Federal Trade Commission in the above entitled matter.

That this transcript is certified to the United States Circuit Court of Appeals for the Seventh Circuit, pursuant to the filing in said Court of a petition for review of an Order to Cease and Desist, dated September 7, 1938, entered by the Federal Trade Commission in that proceeding.

In witness whereof, I hereunto subscribe my name, and affix the seal of the said Federal Trade Commission, at its office in the City of Washington, D. C., this 19th day of April, A. D. 1939.

Otis B. Johnson,
Otis B. Johnson,
Secretary.

(Seal)

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At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on the third day of October, in the year of our Lord one thousand nine hundred and thirty-nine, and of our Independence the one hundred and sixty-fourth.

6792

BUNTE BROTHERS, INC., A CORPORATION, PETITIONER

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

Petition for Review of Order of Federal Trade Commission

And, to wit: On the twentieth day of February 1940, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to wit:

In The United States Circuit Court of Appeals for the Seventh Circuit

No. 6792

October Term, 1939. January Session, 1940

BUNTE BROTHERS, INC., A CORPORATION, PETITIONER

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

Petition for Review of Order of Federal Trade Commission

February 20, 1940

Before EVANS, TREANOR, and KERNER, Circuit Judges.

EVANS, Circuit Judge: Petitioner seeks to set aside an order of the Federal Trade Commission directing it to cease and desist from certain unfair trade practices in the sale of its candy.

The order is based upon findings made by the Commission after hearings upon a formal complaint. The complaint charged, and the Commission found, that petitioner is an Illinois corporation, with its principal place of business in Chicago, Illinois,[1] and that for several years past it has been engaged in the manufacture, sale, and distribution of candies to wholesale dealers, jobbers, and retailers, located throughout the United States, but particularly in the state of Illinois.

The Commission found that petitioner's sales of candies involved the use of chance (commonly known as "break and take") in the sale

[1] See *Bunte Bros.* v. *F. T. C.*, 104 F. (2d) 996.

and distribution to the ultimate consumers thereof. Typical of these assortments is one composed of a number of wrapped caramels, uniform in size, shape, and quality, a number of larger pieces of candy, and a box of candy. The majority of caramels in the assortment have the same color center, but a few are of a different color. The purchaser buys a caramel and breaks it open. If its center is of the same color as the majority of the caramels, he receives nothing extra, but if it is of a different color, he is given, without additional charge, one of the larger pieces of candy in the assortment. The purchaser of the last piece of candy of uniform size and shape in each assortment is entitled to receive, without additional charge, the box of candy in the assortment. This assortment was extensively sold in Illinois during the summer months of 1935, and was known as the "Summer Bar Assortment."

It was also found that petitioner manufactures and distributes in Illinois another assortment known as the "Ta-Ka Flyer Bar Assortment." The principle of this assortment is the same as that described above. There are 160 pieces of candy in all, twenty of which have differently colored centers. The pieces are sold to the consumer at a price of one cent each, whereupon they are broken open to ascertain the color of the center. Those who have selected a piece with a differently colored center receive, as a reward, a larger piece of candy, gratis.

Petitioner distributed its assortments to 95% of the candy jobbers in Illinois. During the year 1936, approximately 23% of its total candy business, or $72,300 worth, consisted of the "break and take" variety. All candies are sold through the same type of merchandizing channels. Jobbers who handle chance assortments also handle "straight" goods. Many retail dealers prefer to buy their candy from one jobber because of the convenience in dealing with a single salesman, handling only one order blank, and paying but one bill. The retail dealers who desire chance assortments are, therefore, prone to buy all of their candy from a jobber who sells chance assortments.

The Commission also found that the effect of the practice of petitioner substantially lessened competition to the detriment of its competitors, situated in other states, who also sold candy in the state of Illinois.

Among other matters the Commission found:

"Some out-of-state manufacturers experienced a marked decrease in their sales of straight goods in Illinois * * * when the sale of chance assortments, particularly of the break and take variety, was active * * *. A representative of a New York manufacturer suffered a marked decline in his sales of straight candies in the Illinois market in May and June of 1935 over sales of straight candies in the same market in May and June of 1934. * * * The sales of a Pennsylvania manufacturer of a competing confection, chewing gum, in Illinois in September and October of 1935, were but 74% and 62%, respectively, of his sales in the same market during the same months

n 1934. * * * The presence in the Illinois market of 40,000 of respondent's (petitioner herein) break and take chance assortments during the year 1935 was a strong factor contributing to the sales declines these interstate competitors of respondent suffered. * * * A competitor of respondent, located in the state of Wisconsin, who had been ordered, by this commission to cease and desist from the unfair practices which respondent was pursuing, suffered an 80% reduction of sales in Illinois from the $60,000 business of the preceding year. Another Wisconsin competitor who had a $100,000 yearly business was adversely affected 20%."

Upon these findings, the Commission entered its cease and desist order.

Almost identical practices have been condemned in Federal Trade Commission v. Keppel, 291 U. S. 304, as unfair methods of competition within the meaning of section 5 of the Federal Trade Commission Act. Following this decision, we, in Bunte Bros. v. Federal Trade Commission, 104 F. (2d) 996, upheld the Commission's order to desist from practices quite similar.

We are on secure and undisputed ground, when we assume that an order of the Commission to be valid must be supported by evidence which establishes: (1) The methods used are unfair; (2) The methods of competition condemned must be used in interstate commerce; (3) The proceeding by the Commission to prevent the use of the methods must be in the interest of the public. Federal Trade Commission v. Royal Milling Co., 288 U. S. 212, 216.

That the practice complained of herein is unfair, is settled by the decisions. See Bunte Bros. v. Federal Trade Commission, supra, and Federal Trade Commission v. Keppel & Bros., supra.

From the findings of the Commission sustained by the evidence, it is equally clear that the instant proceeding is in the public interest. A great percentage of the consuming public buys candy. The Commission found that 48 candy manufacturers located in thirteen different states, and shipping in excess of $1,440,000 worth of "straight" candy from their factories to the state of Illinois annually, were handicapped in attempting to compete with petitioner within the state.[2] It is sufficiently within the public interest, moreover, if the unfair method threatens the existence of potential, as well as existing competition. Federal Trade Commission v. Klesner, 280 U. S. 19, 28. See also Federal Trade Commission v. Keppel & Bros., supra.

The only debatable question in the case is restricted to the asserted non-interstate character of the business affected by the order. Petitioner denies that its condemned business was or is interstate.

The order was directed against the methods used by petitioner in the state of Illinois. It reads:

---

[2] The Commission stated that there were outstanding against 127 competitors of petitioner, orders requiring them to cease and desist from the use of such methods in connection with their sales in interstate commerce.

"It is Ordered that the respondent, Bunte Bros., Inc., * * * in the offering for sale, sale, and distribution of candy, in the State of Illinois, do cease and desist from: * * *"

Section 44, Title 15, U. S. C. A., provides:

"'Commerce' means commerce among the several states or with foreign nations, * * *."

Section 45 (a) provides:

"Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

"The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

Our question may be stated thus: Is an order directed to an Illinois candy manufacturer engaged in distributing its product in the state of Illinois, valid, which commands it to cease and desist from certain unfair practices in the sale and distribution of its candy in the state of Illinois?

Petitioner answers in the negative and cites:

Schechter Corp. v. U. S., 295 U. S. 495; Federal Trade Commission v. Algoma Lumber Company, et al., 291 U. S. 67; Federal Trade Commission v. Maisel Trading Post, Inc., 77 F. 2d, 246; Minnesota Rate Cases, 230 U. S. 352; Winslow v. Federal Trade Commission, 277 Fed. 206; Utah-Idaho Sugar Co. v. F. T. C., 22 Fed. 122; California Rice Industry v. Federal Trade Commission, 102 F. 2d 716; Canfield Oil Co. v. Federal Trade Commission, 274 Fed. 571; Ward Baking Co. v. Federal Trade Commission, 264 Fed. 330; Federal Trade Commission v. American Tobacco Co., 264 U. S. 298; Federal Trade Commission v. Claire Furnace Co., 285 Fed. 936 (reversed on another ground); Leader v. Apex Hosiery Co., decided by CCA 3, November, 1939; United Leather Workers Int. Union v. Herkert Co., 265 U. S. 457.

Its chief reliance seems to be the Schechter case.

The respondent contends that "unfair methods of competition in commerce" extend not only to commerce between the states but to interstate commerce where the unfair practices in the latter field affect the interstate commerce of the same industry. In other words, unfair methods adopted by one who makes and sells his candy in Illinois is subject to the Act if such maker indulges in unfair trade methods and his unfair trade methods affect, and interfere with, interstate commerce in candy. In the instant case the respondent found that petitioner's unfair methods of trade did interfere and affect the commerce which candy makers of Wisconsin and New York carried on with the retailers in Illinois. As supporting its view it cites:

Loewe v. Lawlor, 208 U. S. 274; National Labor Relations Board v. Fainblatt, 306 U. S. 601; Federal Trade Commission v. Wallace, 75 F. 2d 733; Currin v. Wallace, 306 U. S. 1; Consolidated Edison Co.

v. Nat. Labor Relations Board, 305 U. S. 197; Second Employers' Liability Cases, 223 U. S. 1; Nat. Labor Relations Board v. Planters Mfg. Co., 105 F. 2d 750; Fed. Trade Commission v. Keppel & Bros., 291 U. S. 304; Ramsay Co. v. Associated Bill Posters, Etc., 260 U. S. 501; National Labor Relations Board v. Jones and Laughlin Steel Corp., 301 U. S. 1; Houston & Texas Ry. v. U. S., 234 U. S. 342; Wis. R. R. Com. v. C. B. & Q. R. R. Co., 257 U. S. 563; B. & O. R. R. Co. v. I. C. C., 221 U. S. 612; Oklahoma v. Kansas Natural Gas Co., 221 U. S. 229; Montague & Co. v. Lowry, 193 U. S. 38; Eastern States Retail Lumber Dealers Assn. v. U. S., 234 U. S. 600; Coronado Coal Co. v. United Mine Workers, 268 U. S. 295; United Leather Workers v. Herkert, 265 U. S. 457; Carter v. Carter Coal Co., 298 U. S. 238; Swift & Co. v. U. S., 196 U. S. 375; Stafford v. Wallace, 258 U. S. 495; Chamber of Commerce v. F. T. C., 13 F. 2d 673; Blankenship v. Kurfman, 96 F. 2d 450; Lake Valley Farm Products Inc. v. Milk Wagon Drivers' Union, CCA 7, decided Nov. 29, 1939.

Numerous arguments press for consideration in the disposition of this close and troublesome question.

On the one side the fear is expressed that the more recent decisions of the courts, most noticeable of which are National Labor Relations Board v. Jones & Laughlin Steel Corporation, supra, and Electric Bond Co. v. Commission, 303 U. S. 419, have obliterated the heretofore well-defined and well-recognized distinctions between state and Federal Government activities and have perfected a well-nigh completely centralized government. The commonly entertained idea that it is judicial decisions which have led to the disappearance of the local governments as a controlling force in business is erroneous. The enlargement of Federal Government activity is traceable directly to the ever-increasing reach of commerce which has refused to remain static or local. It is this enormous growth in the field of commercial activities which has emphasized the commerce clause of the Federal Constitution and enlarged the scope of its application. This growth of commerce in turn has been the inevitable result of the inventive traits and qualities of our people, whose discoveries have improved old, and created new, instruments of transportation, so that now nearly all commerce is interstate.

Equally significant is the necessity, so apparent in some phases of commerce, for regulation by Congress of intrastate business because its control is essential or appropriate to the regulation of a similar phase of the same commerce but interstate in character. The close, intimate, essential, and inseparable relation of intrastate commerce to interstate commerce, in some fields, makes it necessary to include both, if the legislation is to be effective.

This fear of over-centralization, if real and well grounded, may be overcome either through non-action by Congress or by Federal legislation which discriminatingly restricts its scope so that our duel system of government is preserved. It is not within the field of judicial action.

Equally pressing has been the argument that when commerce, both state and interstate, is conducted by those who will not abide by "the rules of the game," and whose business ethics are such that they resort to unfair methods of trade in order to get an undue advantage of a competitor and to do so, hide behind the protection of state non-action and defy the Federal Government to stop a business thus builded on unfair methods, courts should sustain the efforts of the Federal Trade Commission to stop such unfair practices even though the business be wholly intrastate. The argument is strongly advanced to invoke the Federal commerce clause on the theory that it is both essential and appropriate to regulate the intrastate commerce in such cases because of its close relation to the interstate commerce.

Here, too, the fault lies not with judicial decisions, but is due to two other influences:

First. The unethical practices of so-called businessmen who believe all is legitimate and proper which is not condemned by statute. Not finding a prohibition "written in their bond," they proceed to take advantage of competitors who have a higher regard for the deceneies of competitive efforts.

Petitioner's practices have been condemned by court decisions as unfair, unethical, and contrary to the laws which govern interstate commerce. Its persistence in continuing practices thus condemned may find legalistic but no moral support in this decision. An unfair business practice is still unethical, even though not included within the reach of a statute which prohibits it in interstate commerce. Petitioner limits its field of unethical practices to intrastate commerce where the Federal Government's statute does not apply. Its avoidance of legal liability in no way exculpates it from the charge of foul business practices.

Second. The absence of state legislation dealing with intrastate business, which condemns and prohibits the same unfair practices condemned by the Federal Trade Act.

These arguments for and against our applying the Federal Trade Commission Act to the case before us cannot, however, be taken too seriously. The only practices with which the Commission may concern itself are transactions "in interstate commerce." The Commission's authority is to be found in the Act which created it, as amended. The purpose of the Act was to supplement the Sherman Anti-Trust Act (Federal Trade Commission v. Beechnut Packing Co., 257 U. S. 441, 453) and to prohibit practices which were unfair and destructive of competition "in interstate commerce." On this point there is no doubt. Both the intent and the language of the Act are clear. But when it comes to the field of competition covered by the Act it is less clear and "plain." The words, the meaning of which we are to construe, are definitely "in commerce" not "affecting interstate commerce."

We have been favored with briefs which cite, analyze, distinguish, criticize, or approve nearly all the cases which have been before the

courts, involving this Act, as well as many cases which have dealt extensively with the subject of interstate commerce. In view of the exhaustive discussions appearing in the opinions in these cases, further discussion is hardly appropriate. We must assume they state the law as it exists today and that legislation defining "commerce," "in commerce," and "affecting interstate commerce" must be applied in the light of said decisions.

Our conclusion (which is not free from doubt) is that the phase of petitioner's business wherein its practices are unfair is wholly intrastate. It is the phase of petitioner's business which is conducted wholly in Illinois, by an Illinois corporation, which makes and sells its product in Illinois. It is not within the purview of Section 5 of the Federal Trade Commission Act. If an extension of the Federal Trade Commission's jurisdiction be advisable so as to include practices affecting interstate commerce, it is for Congress, not the court, to make the change.

The petitioner is entitled to the relief sought and to an order vacating and setting aside the order of the Federal Trade Commission.

And on the same day, to wit: On the twentieth day of February 1940 the following further proceedings were had and entered of record, to wit:

Tuesday, February 20, 1940

Court met pursuant to adjournment

Before Hon. EVAN A. EVANS, Circuit Judge; Hon. WALTER E. TREANOR, Circuit Judge; Hon. OTTO KERNER, Circuit Judge.

6792

BUNTE BROTHERS, INC., A CORPORATION, PETITIONER

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

Petition for Review of Order of Federal Trade Commission

This cause came on to be heard on the petition for review of an order of the Federal Trade Commission, the transcript of the record from the said Federal Trade Commission, and the briefs of counsel, and was argued by counsel.

On consideration whereof: It is now here ordered and adjudged by this Court that the Order entered in this cause on September 7, 1938, by the Federal Trade Commission be, and the same is hereby, vacated and set aside.

United States Circuit Court of Appeals for the Seventh Circuit

I, Kenneth J. Carrick, Acting Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the

foregoing typewritten pages, numbered from 1 to 11, inclusive, contain a true copy of the Opinion of this Court, filed February 20, 1940, and the judgment entered on the twentieth day of February 1940, in the case of Bunte Brothers, Inc., a corporation, petitioner, vs. Federal Trade Commission, Respondent, No. 6792, October Term, 1939, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 4th day of May A. D. 1940.

[SEAL]

KENNETH J. CARRICK,
Acting Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1940

Supreme Court of the United States

Order allowing certiorari

Filed October 14, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1940

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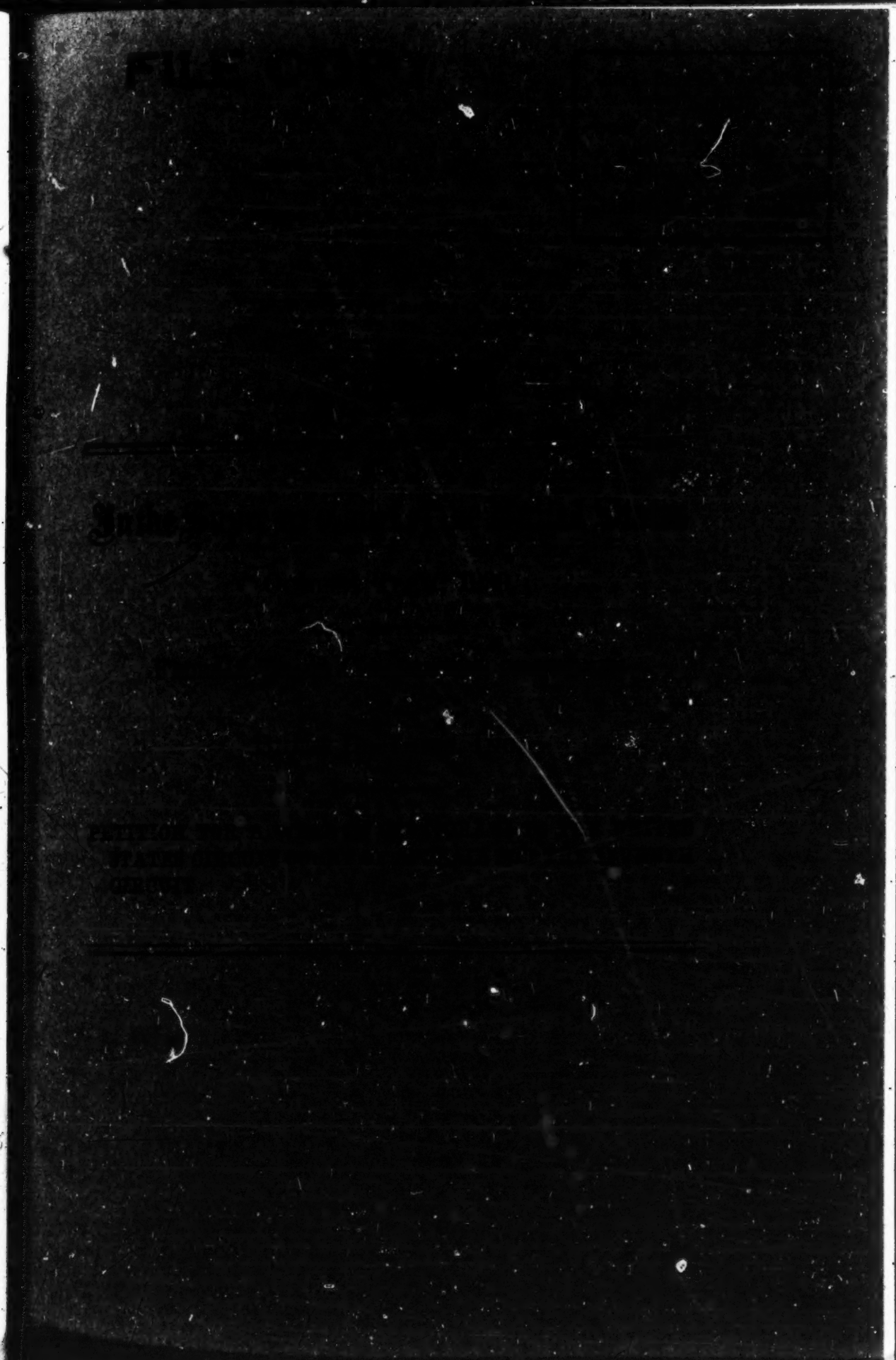

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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. ———

FEDERAL TRADE COMMISSION, PETITIONER

v.

BUNTE BROTHERS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Seventh Circuit entered in this cause on February 20, 1940, which vacated and set aside an order of the Federal Trade Commission requiring the respondent to cease and desist from certain unfair methods of competition in connection with sales in the State of Illinois.

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 321) is reported in 110 F. (2d) 412.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered February 20, 1940 (R. 327). The jurisdiction of this Court is invoked under Section 5 of the Federal Trade Commission Act, as amended, U. S. C., Title 15, Section 45, and under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Does the Federal Trade Commission have power to prohibit unfair methods of competition in connection with intrastate sales which reduce the quantity and divert the course of interstate sales and shipments?

STATUTE INVOLVED

The statute involved is the Federal Trade Commission Act, originally enacted September 26, 1914, c. 311, 38 Stat. 717, as amended March 21, 1938, c. 49, 52 Stat. 111, U. S. C. Supp. v, Title 15, Sections 41 *et seq.*[1] The pertinent provisions of the Act are:

> SEC. 4. The words defined in this section shall have the following meaning when found in this Act, to wit:
>
> "Commerce" means commerce among the several States or with foreign nations, or in

[1] This proceeding was instituted by the Commission before, but concluded after the passage of, the amendatory Act on March 21, 1938. The amendments are not pertinent to this proceeding.

any Territory of the United States or in the District of Columbia, or between any such Territory and another or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation;

* * * * * *

SEC. 5. (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 406 (b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

Respondent is engaged in the manufacture and sale of candy (R. 311). The candy is sold to wholesalers, jobbers, and retailers (R. 311). Some of it is sold in assortments so arranged that purchasers of pieces having centers of a particular color receive a larger piece of candy or a box of candy in addition to their original purchase without additional charge (R. 312). This method of sale is indistinguishable from that which this Court held unfair in *Federal Trade Commission* v. *Keppel and*

Bro., 291 U. S. 304,[2] and the Circuit Court of Appeals so found.

After this Court decided the *Keppel* case, the Federal Trade Commission instituted a proceeding against respondent and issued an order directing respondent to cease and desist from this method of competition in connection with its interstate sales. This order was affirmed by the Circuit Court of Appeals for the Seventh Circuit. *Bunte Bros., Inc.* v.

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[2] Similar orders of the Federal Trade Commission have since been affirmed by the Circuit Courts of Appeals in 31 cases:

C. C. A. 7th: *Hofeller* v. *F. T. C.*, 82 F. (2d) 647, *certiorari denied*, 299 U. S. 557; *F. T. C.* v. *McLean & Son, a corporation, et al.* (four cases), 84 F. (2d) 910, *certiorari denied*, 299 U. S. 590; *F. T. C.* v. *George Ziegler Co.*, 90 F. (2d) 1007; *F. T. C.* v. *Barager-Webster Co.*, 95 F. (2d) 1000; *F. T. C.* v. *American Candy Co.*, 97 F. (2d) 1001; *Bunte Brothers, Inc.* v. *F. T. C.*, 104 F. (2d) 996; *National Candy Co. et al.* v. *F. T. C.* (3 cases), 104 F. (2d) 999, certiorari denied, 308 U. S. 619.

F. T. C. v. *Charles N. Miller Co.*, 97 F. (2d) 563 (C. C. A. 1); *F. T. C.* v. *Leader Novelty Candy Co.*, 92 F. (2d) 1002 (C. C. A. 2); *F. T. C.* v. *Rittenhouse Candy Co.*, decree Jan. 5, 1938, not reported (C. C. A. 3); *Minter et al.* v. *F. T. C.*, 102 F. (2d) 69 (C. C. A. 3); *F. T. C.* v. *Southern Premium Mfg. Co.*, 83 F. (2d) 1008 (C. C. A. 5); *F. T. C.* v. *H. I. Sifers*, 84 F. (2d) 999, motion to modify, overruled Jan. 23, 1937 (C. C. A. 8); *F. T. C.* v. *F. A. Martoccio Co.*, 87 F. (2d) 561 (C. C. A. 8), *certiorari denied*, 301 U. S. 691; *F. T. C.* v. *Chase Candy Co.*, 97 F. (2d) 1002 (C. C. A. 8); *Helen Ardelle, Inc., Brown & Haley, Canterbury Candy Makers, Inc., Imperial Candy Co., and Rogers Candy Co.* v. *F. T. C.*, 101 F. (2d) 718 (C. C. A. 9); *F. T. C.* v. *Brecht Candy Co., Cosner Candy Co., Savage Candy Co.*, 92 F. (2d) 1002, 1003 (C. C. A. 10); *Ostler Candy Co. et al.* v. *F. T. C.* (three cases), 106 F. (2d) 962 (C. C. A. 10).

Federal Trade Commission, 104 F. (2d) 996. The present proceeding involves the same practices in connection with intrastate sales in Illinois.

The complaint charged (R. 18–19) and the Commission found (R. 314–317) that the use of this method of competition in Illinois diverted trade from competitors outside Illinois who did not use the chance method of selling and who would otherwise have made sales in interstate commerce to Illinois purchasers. The business of competitors who were selling "straight" candies in interstate commerce into Illinois was reduced both because chance assortments were often preferred to straight goods and because many persons preferred to buy both their straight and chance assortments from a single salesman or in a single shipment and accordingly purchased only from jobbers who sold both kinds of assortments (R. 314–317). The Commission's order required respondent to cease and desist from selling chance assortments in the State of Illinois (R. 317–318).

The Circuit Court of Appeals set aside this order on the ground that under the statute the Commission's power extended only to practices *in* interstate commerce and not to those which affected interstate commerce (R. 326). It admitted that this conclusion was "not free from doubt" (R. 327). The Court of Appeals characterized respondent's methods of competition as "unfair" and "unethical" (R. 326). Although respondent contended that application of the Act to its intrastate sales

would be unconstitutional, the Court did not suggest that the Federal Government lacked constitutional power under the commerce clause to reach intrastate acts of the kind here in question.

SPECIFICATION OF ERROR TO BE URGED

The Court below erred in holding that the Federal Trade Commission has no power to prohibit unfair practices in connection with intrastate sales which divert and reduce the amount of interstate sales by competitors who do not engage in such practices.

REASONS FOR GRANTING THE WRIT

1. The question involved is one of public importance which should be decided by this Court. The Federal Trade Commission Act was intended to protect all interstate competition from the evils of unfair practices. *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 647–648. The transactions prohibited by the Commission's order in this case were consummated within the boundaries of a single state, but they were carried on in direct competition with other transactions consummated across state lines. Thus the competition which the Commission was attempting to control was essentially interstate in character. The decision below denies to the Commission the power to deal with unfair practices of this kind. Its effect is to put interstate commerce at the mercy of intrastate competitors who engage in unfair practices. If the decision is correct, the power of the Commission

to protect interstate commerce and those engaged therein from unfair and discriminatory practices by competitors is severely limited. The question thus is one of first importance in the administration of the Federal Trade Commission Act and warrants an authoritative decision by this Court.

2. The decision below is in conflict with other decisions in the Circuit Courts of Appeals, which have construed the Federal Trade Commission Act as applying to intrastate transactions which affect interstate commerce or which occur in the current of interstate competition. In *National Harness Mfrs.' Ass'n* v. *Federal Trade Commission,* 268 Fed. 705, 709, the Circuit Court of Appeals for the Sixth Circuit stated:

> The contention that the Harness Manufacturers' Association is not engaged in commerce is answered by the consideration, first, that many of its members are so engaged; and, *second, that interstate commerce is claimed to have been directly affected by the alleged unfair methods of competition.* [Italics supplied.]

In *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission,* 13 F. (2d) 673, 684, the Circuit Court of Appeals for the Eighth Circuit, rejecting attacks on the Commission's jurisdiction, declared:

* * * * *

> A second ground is that the Chamber is not engaged in interstate commerce. * * * Although the Chamber *is not itself engaged*

> *in any commerce* in the sense of being a trader or shipper, yet it is an instrumentality in the current of interstate commerce *which directly affects such commerce* and is within the regulatory power of Congress. * * *
>
> A third ground is that any effect of the rules of the Chamber upon interstate commerce is indirect, therefore, regulation of such Chamber is a matter for state action in the absence of congressional regulation. This may be true as a broad general statement. * * * *But Congress, in the Federal Trade Commission Act, has assumed to legislate concerning "unfair methods of competition" affecting interstate commerce and if any action by or any rule or regulation of the Chamber has that effect it is certainly subject to that act,* no matter what the state has or has not authorized or permitted in that respect. [Italics supplied.]

The position taken by the court below is supported by a recent decision in the Court of Appeals for the Ninth Circuit. *California Rice Industry* v. *Federal Trade Commission,* 102 F. (2d) 716, 723, Because of the conflicting views of the various circuit courts of appeals as to the scope of the Act, the question here involved should be resolved by this Court.

3. The decision below is inconsistent with decisions construing other statutory provisions designed to protect interstate commerce from unfair and discriminatory practices.

For example, in the *Shreveport Case* (*Houston & Texas Ry.* v. *United States*), 234 U. S. 342, this Court held that the Interstate Commerce Commission had statutory authority to regulate intrastate rates which discriminated against interstate commerce.[3] Section 3 of the Act to Regulate Commerce (24 Stat. 379, 380, 41 Stat. 479, U. S. C., Title 49, Sec. 3) made it unlawful for any carrier to give any undue or unreasonable preference or advantage to one shipper or description of traffic over another. A proviso in Section 1 of the Act (24 Stat. 379, 34 Stat. 584, 36 Stat. 545, 41 Stat. 474, U. S. C., Title 49, Sec. 1 (2)) stated:

> *Provided, however,* That the provisions of this Act shall not apply to the transportation of passengers or property * * * wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid * * *.

In the *Shreveport Case,* it was shown that lower intrastate rates discriminated against interstate shipments by giving to intrastate shippers an important preferential advantage—a situation substantially identical with that in the case at bar. This Court held that the proviso of Section 1 was inapplicable, saying (234 U. S. at 358–359):

> The Commission was dealing with the relation of rates injuriously affecting,

[3] The case arose in 1911, before this authority was expressly conferred upon the Commission by the Transportation Act of 1920, c. 91, 41 Stat. 484, U. S. C., Title 49, Section 13 (4).

> through an unreasonable discrimination, traffic that was interstate. The question was thus not simply one of transportation that was "wholly within one State." These words of the proviso have appropriate reference to exclusively intrastate traffic, separately considered; to the regulation of domestic commerce, as such. The powers conferred by the act are not thereby limited where interstate commerce itself is involved. This is plainly the case when the Commission finds that unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by a carrier subject to the act. Such a matter is one with which Congress alone is competent to deal, and, in view of the aim of the act and the comprehensive terms of the provisions against unjust discrimination, there is no ground for holding that the authority of Congress was unexercised and that the subject was thus left without governmental regulation.

The same considerations of policy, statutory purpose and constitutional power apply *a fortiori* in the present case, for the broad phrase "competition in commerce" is found in the Federal Trade Commission Act without any express limitation exempting, as in the *Shreveport Case,* activities "wholly within one State."

A similar construction was given to Section 2 of the Clayton Act (38 Stat. 730, U. S. C., Title 15, Sec. 13), which prohibits certain price discrim-

inations "in the course of [interstate] commerce". *American Can Co.* v. *Ladoga Canning Co.*, 44 F. (2d) 763 (C. C. A. 7th), certiorari denied, 282 U. S. 899. The defendant sold cans intrastate [4] to the Van Camp Company at a price lower than to the plaintiff, Ladoga Canning Co. As a result Van Camp was able to sell its food products in interstate commerce at lower prices than Ladoga. The court held that the Act applied to defendant's intrastate sales because of their effect upon interstate competition.

The Federal Trade Commission Act was passed in order to supplement and strengthen the regulation of monopolies and restraints of trade embodied in the Sherman Act.[5] S. Rept. No. 597, 63d Cong., 2d Sess.; H. Rept. No. 1142, 63d Cong., 2d Sess., pp. 18–19; *Federal Trade Commission* v. *Raladam Co., supra,* 650; *Federal Trade Commission* v. *Keppel & Bro., supra; Federal Trade Commission* v.

[4] 99% of the sales were intrastate. 44 F. (2d) at 770.

[5] Contemporaneous lists of practices which would come within the statutory proscription of unfair methods were comprised almost entirely of practices conducive to monopoly. See H. Rept. No. 533, Part 3, 63d Cong., 2d Sess., pp. 19–20 (minority views); Letter from the Commissioner of Corporations to the Chairman of the Committee on Interstate Commerce transmitting certain suggestions relative to the bill (H. R. 15613) to create a Federal Trade Commission, 63d Cong., 2d Sess., p. 16; William S. Stevens, *Unfair Competition*, 29 Political Science Quarterly 282, 460. This Court discussed at length the relationship between the Sherman Act and the Federal Trade Commission Act in the *Raladam* case (283 U. S., at 650).

Beech-Nut Packing Company, 257 U. S. 441. In the *Keppel* case this Court said (291 U. S. at 310): "The Act undoubtedly was aimed at all the familiar methods of law violation which prosecutions under the Sherman Act had disclosed." That the Sherman Act prohibited restraints and practices intrastate in nature because of their effect upon interstate commerce was well established at the time the Federal Trade Commission Act was enacted.[6] The Federal Trade Commission Act would not have been an effective instrument for the enforcement of the Antitrust Act if it had been narrower in scope than the statute which it was designed to supplement.

The debates in Congress in connection with the definition of commerce in the Trade Commission Act also demonstrate that Congress intended that statute, like the Sherman Act, to go to the limits of the federal commerce power, at least within the continental United States. The bill as originally introduced (H. R. 15613) defined commerce as meaning "such commerce as Congress has power to regulate under the Constitution." 51 Cong. Rec. 8844–8845; S. Rept. No. 597, 63d Cong., 2d Sess., p. 1. The conference committee changed this definition to that finally adopted (*supra*, pp. 2–3.

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[6] *Swift & Co.* v. *United States*, 196 U. S. 375; *Northern Securities Company* v. *United States*, 193 U. S. 197; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *Patten*, 226 U. S. 525. Cf. *Standard Oil Co. (Indiana)* v. *United States*, 283 U. S. 163; *Local 167* v. *United States*, 291 U. S. 293.

The debate shows that the only reason for the change was "to exclude commerce with any possessions of the United States that were not States or Territories or the District of Columbia," that is, the Philippines, the Canal Zone, Porto Rico, and Guam. 51 Cong. Rec. 14927, 14935.[7] The clear inference is that Congress intended to subject to the

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[7] The following colloquy explains the reason for the above change (51 Cong. Rec. 14935):

"Mr. WILLIS. * * * I wish to ask the gentleman a question about the definition of commerce. The gentleman will recall in the bill as passed by the House that commerce was defined as all 'such commerce as Congress has power to regulate under the Constitution.' The Senate bill has the same definition.

* * * * *

"I am wondering what the reason was that led the conferees to provide in the conference agreement that the word 'commerce' should be so defined as to exclude from the operations of the act commerce with the Canal Zone, Porto Rico, Guam, and the Philippines, yet at the same time including commerce with Alaska and Hawaii. No reason has been given by anyone for this distinction.

"Mr. STEVENS of Minnesota. * * * The reason was that we did not think that the scope of the commission should be extended that far, to embrace our foreign possessions. That conditions there are so different than here that they could be handled by local authorities better than by a commission 7,000 miles away in the city of Washington. If the scope of the commission needs to be extended hereafter to any of them, it can be done, but at present we thought it would hamper rather than to help business there and here. The commission should have enough to do here in the United States."

Act all commerce which it had power to regulate under the Constitution except in certain of the outlying possessions.[8]

CONCLUSION

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit should be granted.

FRANCIS BIDDLE,
Solicitor General.

MAY 1940.

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[8] This inference is not negatived by the fact that in 1935 it was proposed that the Act be amended so as to apply to practices "in or affecting" commerce. S. 944, 74th Cong., 1st Sess. The purpose of the proposed amendment, which passed the Senate but was reconsidered on objection that its application to intrastate matters might be too broad (79 Cong. Rec. 1842–1844), was to remove doubts as to the meaning of the statute. (S. Rept. No. 46, 74th Cong., 1st Sess.) Although the words "or affecting" were not included in the amendment finally adopted in 1938 (52 Stat. 111), there is no indication of any intention that the law should have a more restricted application than was desired by the Congress which enacted it.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 85

FEDERAL TRADE COMMISSION, PETITIONER

v.

BUNTE BROTHERS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 321) is reported in 110 F. (2d) 412.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 20, 1940 (R. 327). Petition for a writ of certiorari was filed May 20, 1940, and was granted October 14, 1940. The jurisdiction of this Court rests on section 5 of the Federal Trade Commission Act (15 U. S. C., sec. 45) and on section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the competition between companies selling in interstate commerce and a company selling in intrastate commerce is "competition in [interstate] commerce" and whether the unfair methods used in such competition by the intrastate seller are "unfair methods of competition in [interstate] commerce", within the meaning of the Federal Trade Commission Act.

STATUTE INVOLVED

The pertinent provisions of the Federal Trade Commission Act, c. 311, 38 Stat. 719, as amended by the Act of March 21, 1938, c. 49, 52 Stat. 111 (15 U. S. C., Supp. V, secs. 44, 45) are as follows:

> SEC. 4. The words defined in this section shall have the following meaning when found in this Act, to wit:
>
> "Commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.
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> * * * * *

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[1] The Commission instituted the present proceeding before, but concluded it after, the passage of the amendatory Act of March 21, 1938. The amendments are not pertinent to the questions in issue in this case, but it may be noted that the words "and unfair and deceptive acts or practices in commerce" in each of the first two paragraphs of section 5 were added by the Act of March 21, 1938.

SEC. 5. (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

Respondent is a candy manufacturer engaged in selling its product both in Illinois, where its principal office and place of business are located, and in other states (R. 8). The Commission, prior to the order which it issued in the present case, had issued an order against respondent in another proceeding directing it to cease from selling candy in interstate commerce so packed and arranged that the amount received by the ultimate purchaser was dependent upon chance. The practices against which this order was directed were indistinguishable from those found to be unfair methods of competition in *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304, and the order was affirmed on review. *Bunte Bros., Inc.* v. *Federal Trade Commission*, 104 F. (2d) 996 (C. C. A. 7).

The present proceeding involves the validity of respondent's use of the same unfair methods of competition in sales to Illinois purchasers. The Commission concluded that these were unfair methods of competition in interstate commerce within the meaning of section 5 of the Trade Commission Act and it entered an order requiring respondent to desist therefrom in its sales in the state of Illinois (R. 14–15). The Commis-

sion's conclusion and order were based on the following findings of fact, among others:

Candies so packed as to involve the element of chance in their sale, which are referred to as chance assortments, are in direct competition with candies packed for sale at a stated price per unit, which are known as "straight goods" (R. 11). Many retail dealers prefer to buy all of their candy from one jobber and, consequently, such retail dealers, if they desire chance assortments, purchase all of their candy from a jobber who handles, in addition to straight goods, chance assortments as well (*ib.*).

A salesman for a candy manufacturer who can offer chance assortments of candy "has a tremendous advantage in soliciting business from jobbers" over one who does not have such chance assortments to offer (*ib.*). The representatives of 48 candy manufacturers whose plants were located in states other than Illinois and who shipped annually into Illinois over $1,440,000 of straight candies found that their failure to carry chance assortments was a decided handicap in securing business in Illinois (*ib.*).

At the close of the taking of testimony in this proceeding 127 competitors of respondent had outstanding against them orders which required them to cease and desist from selling chance assortments of candy in interstate commerce (R. 8–9).[2] One Wisconsin candy man-

[2] The Commission's orders of this kind have been consistently affirmed. The Government's petition for writ of certiorari in the present case gave citations (p. 4) to decisions of affirmance in 31 cases. In four of the cited decisions certiorari was denied.

ufacturer against whom the Commission had issued such a cease and desist order suffered an 80% decline in his Illinois sales during the four months' period following issuance of this order (R. 12). Another Wisconsin candy manufacturer, against whom such an order had been issued, lost 20% of his Illinois business (*ib.*). Their loss of business was "due directly to the presence of break and take candy in the Illinois candy market" (*ib.*).

Respondent's chance assortments are distributed to 95% of the candy jobbers in Illinois and its Illinois sales of one type of chance assortment rose from 40,000 units in 1935 to 86,000 units in 1936, an increase of 115% (R. 10). The dollar volume of its sales in Illinois rose from $275,400 in 1935 to $314,400 in 1936, of which chance assortments constituted 23% (*ib.*). Respondent's sale of chance assortments in Illinois "has a direct and powerful burdensome effect" upon the shipment of candy into Illinois from other states and "gives respondent an undue and unreasonable preference over competitors located in other states" (R. 13).

The court below did not question the validity of any of the Commission's findings of fact. It also agreed with the Commission that respondent's methods of competition were "unfair" (R. 323). The court likewise did not question the constitutionality of the Commission's exercise of authority provided adequate statutory basis therefor existed (see R. 325, 327). The court nevertheless set aside the Commission's order upon the ground that unfair methods in the promotion

of intrastate sales are not unfair methods of competition "in" interstate commerce within the purview of the Federal Trade Commission Act even though such methods are used in competition with those engaged in interstate commerce and directly divert trade from interstate competitors. The court conceded, however, that "the disposition of this close and troublesome question" was "not free from doubt" (R. 325, 327).

SUMMARY OF ARGUMENT

The Federal Trade Commission Act prohibits "unfair methods of competition in [interstate] commerce". In determining the scope of the words "competition in commerce", the commerce of the party injured by the unfair methods of competition is just as important as the commerce of the party using the unfair methods. Competition between goods sold in interstate commerce and goods sold intrastate is competition "in" interstate commerce and unfair methods used in such competition by the intrastate seller are unfair methods of competition in such commerce.

This construction of the act serves to effectuate its purpose. It, like the Sherman Act, was enacted in order to maintain freedom of competition in interstate commerce. If this purpose is to be effectively achieved the act should apply whenever interstate commerce is subjected to the kind of injury which the statute was intended to prevent, irrespective of whether the acts or conduct causing the injury are themselves interstate or not. This has been the construction given the Sherman Act. It applies where interstate competition or inter-

state trade is unduly restrained by conduct outside the field of interstate commerce and the "supplementary" Federal Trade Commission Act should be given an equally broad application.

Unless the Trade Commission Act protects interstate commerce against injury from the unfair methods of competition used by an intrastate seller, the statute, enacted by Congress in the exercise of its commerce power, will or may operate to discriminate against interstate commerce in favor of intrastate commerce. The record in the present case shows that this very situation has arisen in the candy trade. A construction of a statute producing unreasonable consequences should be rejected if its language permits another interpretation consistent with the legislative purpose.

Certain decisions by the lower federal courts have recognized that an unfair trade method which adversely affects interstate competitors necessarily is, because of this effect, an unfair method of "competition in [interstate] commerce." In addition, the interpretation of the statute urged by the Government is supported by the construction which has been placed upon statutory provisions closely analogous to those here involved. *Houston, East & West Texas Ry. Co.* v. *United States,* 234 U. S. 342, 358–359; *American Can Co.* v. *Ladoga Canning Co.,* 44 F. (2d) 763, 770 (C. C. A. 7), certiorari denied, 282 U. S. 899.

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ARGUMENT

THE UNFAIR COMPETITIVE METHODS EMPLOYED BY RESPONDENT IN ITS INTRASTATE SALES, BY WHICH IT DIVERTED TRADE FROM THOSE SELLING IN COMPETITION WITH IT IN INTERSTATE COMMERCE, WERE "UNFAIR METHODS OF COMPETITION IN [INTERSTATE] COMMERCE" WHICH THE COMMISSION WAS AUTHORIZED TO PROHIBIT

The Federal Trade Commission Act makes unlawful "unfair methods of competition in commerce" and the word "commerce" is defined in the act as meaning interstate commerce.[3] The question which is at issue here is the meaning of the words "competition in commerce."

1. Competition necessarily involves rivalry and always is a two-sided affair. Unfair competition is likewise necessarily two-sided: on one side there must be a party engaging in unfair trade methods and on the other side there must be a competitor injured by these unfair methods. There can therefore never be unfair methods of "competition" within the meaning of the Federal Trade Commission Act unless both conditions are present and the Commission is without authority to proceed if only the unfair trade practice, without the corelative injury to a competitor, is established. *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 649.

The construction of the statute adopted by the court below gives consideration to only one of the adversaries

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[3] See section 4, *supra*, p. 2. The definition also includes foreign commerce and commerce in the District of Columbia and territories of the United States, but all that is important for the purposes of the present case is that "commerce" means interstate as distinguished from intrastate commerce.

involved in unfair methods of competition since the court construed the phrase "competition in commerce" solely with reference to the commerce of the party employing the unfair methods of competition. This construction led the court to conclude that the Commission is without jurisdiction if the party using unfair methods of competition employs them solely in promoting his intrastate sales.

The Government contends that the commerce of those injuriously affected by unfair methods of competition must also be considered in determining the application of the phrase "competition in commerce". It submits that the competition between goods sold in interstate commerce and those sold intrastate is competition "in" interstate commerce and that when unfair competitive methods are employed in such competition by one who sells intrastate, these are "unfair methods of competition in [interstate] commerce" within the meaning of the act.

The interpretation of the act urged by the Government, namely, that in determining its application the commerce of the victim is as important as that of the culprit, serves to carry out the recognized objectives of the statute. It is, of course, well settled that where the words of a statute are open to more than one interpretation the courts adopt the one which will best effectuate the statutory objectives and the intention of the lawmakers. The words of the statute "must be read in the light of its general purpose and applied with a view to effectuate such purpose". *Federal Trade Commission* v. *Western Meat Co.*, 272 U. S. 554, 559.

2. "Section 5 of the Trade Commission Act is supplementary to the Sherman Anti-Trust Act". *Federal Trade Commission* v. *Raladam Co., supra,* p. 647. It was passed to stop in their incipiency practices which tend to promote monopoly or to destroy the freedom of the market.[4] The "great purpose" of the act "was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain". *Federal Trade Commission* v. *Sinclair Refining Co.,* 261 U. S. 463, 476. This likewise is the underlying purpose and objective of the Sherman Act. *Paramount Famous Lasky Corp.* v. *United States,* 282 U. S. 30, 42–43.

Since the Trade Commission Act was designed to supplement the prohibitions of the Sherman Act and since the fundamental purpose of the two statutes is the same, the scope and application of the Trade Commission Act is determined in the light of the scope and application of the prohibitions of the Sherman Act. This Court has said that the public policy declared in the Sherman Act is "to be considered in determining what are unfair methods of competition, which the Federal Trade Commission is empowered to condemn and suppress". *Federal Trade Commission* v. *Beech-Nut Packing Co.,* 257 U. S. 441, 453. It has also declared that the Trade Commission Act "undoubtedly was aimed at all the familiar methods of law violation

[4] H. Rept. No. 1142, 63d Cong., 2d Sess., pp. 18–19. See also the practices which were contemporaneously listed as constituting unfair competition (H. Rept. No. 533, part 3, 63d Cong., 2d Sess., pp. 2, 19–20 (minority report); William S. Stevens, *Unfair Competition,* 29 Political Science Quarterly 282, 282–284 (1914)).

which prosecutions under the Sherman Act had disclosed". *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304, 310.

The purpose of the Sherman Act is to prevent undue suppression of interstate competition by combination or conspiracy and the purpose of the Federal Trade Commission Act is to prevent suppression of such competition by unfair competitive methods. Since the purpose of each statute is to protect interstate commerce against a certain kind of injury, its application is to be determined by the presence or absence of this kind of injury, not by the interstate or intrastate character of the conduct giving rise to the injury or threatened injury to interstate commerce. If either statute is inapplicable where intrastate conduct causes the kind of injury to interstate commerce which the statute was designed to prevent, it fails fully to achieve its purpose.

No such limited construction has been placed upon the Sherman Act. It has always been held to apply to intrastate acts and conduct which unduly restrict competition in interstate commerce or unduly restrain interstate trade.[5] We submit that the provisions of the "supplementary" Federal Trade Commission Act should be given an equally wide application and should be held to protect interstate commerce against injury from unfair methods of competition whether the methods themselves are used in intrastate or in interstate commerce.

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[5] For decisions prior to enactment of the Trade Commission Act, see *Loewe* v. *Lawlor*, 208 U. S. 274, 301; *United States* v. *Patten*, 226 U. S. 525, 541–542. For later decisions, see *Standard Oil Co.* v. *United States*, 283 U. S. 163, 168–169; *Local 167* v. *United States*, 291 U. S. 293, 297.

3. There is another principle of statutory construction supporting the Government's position. An interpretation of a statute producing absurd or unreasonable consequences will be rejected if its language permits another construction consistent with the legislative purpose.[6] The interpretation of the Trade Commission Act adopted below means that in the competition between interstate sellers and an intrastate seller, the former are barred from competing by unfair methods but the latter is not. Under this interpretation, the act ties the hands of the former but not of the latter. The interstate sellers must submit to the injury caused by the unfair methods of their intrastate competitor and they are not even free to employ the same unfair methods by way of self-defense. The statute, enacted in the exercise of the commerce power of Congress, thus operates or may thus operate not to protect but to discriminate against interstate commerce in favor of intrastate commerce.

The facts of the present case show that this injurious discrimination against interstate commerce is not a mere theoretical contingency. Unless the decision below is reversed, enforcement of the act will bring about this very discrimination in the candy trade. The Commission has issued orders against at least 127 of respondent's competitors barring them from selling chance assortments of candy in interstate commerce (R. 9), but under the decision below respondent and all

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[6] *Holy Trinity Church* v. *United States*, 143 U. S. 457, 460; *Law Ow Bew* v. *United States*, 144 U. S. 47, 59; *United States* v. *Katz*, 271 U. S. 354, 357.

others selling intrastate may use this same unfair method of competition to increase their business at the expense of those who sell in interstate commerce.

4. Several decisions of the lower federal courts recognize that the power given the Commission to prohibit unfair methods of competition in interstate commerce authorizes it to issue an order against a concern which is not itself engaged in interstate commerce.

In *National Harness Mfrs.' Association* v. *Federal Trade Commission,* 268 Fed. 705 (C. C. A. 6), the Commission had issued an order under section 5 of the Trade Commission Act directing an association composed of local associations of retail dealers to cease from conspiring with others to carry out an unfair system of distribution. The court, relying upon Sherman Act decisions, held (p. 709) that the Commission had authority to issue an order against the association upon two grounds, first, that many of its members were engaged in interstate commerce and, second, "that interstate commerce is claimed to have been *directly affected by* the alleged unfair methods of competition" (italics ours). In *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission,* 13 F. (2d) 673 (C. C. A. 8), the Commission's order, issued under section 5, directed the Chamber of Commerce, which conducted a grain exchange, to abandon certain unfair rules and practices injurious to another grain exchange operating in the same city. The court held (p. 684) that—

> Congress, in the Federal Trade Commission Act, has assumed to legislate concerning "unfair methods of competition" *affecting* interstate commerce and if any action by or any rule or

> regulation of the Chamber has that effect it is certainly subject to that act, * * *. [Italics ours.]

The courts in these cases referred to unfair methods of competition "affecting" interstate commerce. This does not mean that the word "in", as used in the phrase "competition in commerce", was interpreted as the equivalent of the word "affecting". We regard the expression as a short-cut way of saying that whenever unfair trade methods adversely affect competitors selling in interstate commerce, these methods are, by reason of such effect, unfair methods of competition "in" interstate commerce.[7]

Respondent has urged that the decision below is supported by *California Rice Industry* v. *Federal Trade Commission,* 102 F. (2d) 716 (C. C. A. 9). In that case the Commission in a proceeding under section 5 of the Trade Commission Act issued an order requiring an association (organized and controlled by California growers and millers of rice) to cease from fixing prices in interstate commerce and from fixing milling quotas. The court (pp. 722–723) affirmed the former provi-

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[7] In *Canfield Oil Co.* v. *Federal Trade Commission*, 274 Fed. 571 (C. C. A. 6), where the methods of competition which the Commission found to be unfair were used wholly in intrastate commerce, the Commission urged as a defense that the unfair methods affected the interstate business of competitors and that the Commission therefore had jurisdiction to enter its order. The court (pp. 574–575) rejected this defense, not upon the ground that it would be insufficient under the statute, but upon the ground that, even if the Commission's order had been placed on this ground, the evidence and findings did not furnish the necessary factual foundation therefor.

sions of the order but set aside the latter. It held that the fact that the fixing of milling quotas affects the volume of rice entering interstate commerce does not make this practice a method of competition "in" interstate commerce, and ruled that the act did not proscribe unfair practices "affecting" interstate commerce. But in that case the Commission's sole relevant finding was that milling quotas had been fixed. It did not find that production had been limited with the effect of or for the purpose of suppressing interstate competition or fixing prices in interstate markets.[8] Since the bare finding that output was restricted is insufficient to show that interstate competition or interstate competitors were injuriously affected,[9] the decision is entirely consistent with the interpretation of the Federal Trade Commission Act here urged by the Government.

Respondent has also relied upon statements made in *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 216, and in *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 646, where this Court, in setting forth the requisites for a valid order of the Commission, said that the unfair methods complained of must be "methods of competition in commerce".

[8] For the findings of the Commission, see *In The Matter of California Rice Industry*, 26 F. T. C. Decs. 968, 976–981.

[9] In cases under the Sherman Act the mere showing of a combination to stop or limit production is insufficient to establish a combination in restraint of interstate commerce. See *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344; *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295, 310; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 501–504, 512–513.

Clearly these statements do not even inferentially support respondent's construction of the act. Not only was there no question raised in these cases as to whether the unfair methods of competition were or were not "in" interstate commerce, but the quoted language merely repeats the words of the statute.

5. *Houston, East & West Texas Ry. Co.* v. *United States,* 234 U. S. 342, presented a question of statutory construction closely analogous to the question at issue in the present case. The question there was whether the Interstate Commerce Act authorized the Interstate Commerce Commission to regulate intrastate rates which discriminated against interstate commerce.[10] Section 3 of the act made it unlawful for any carrier to subject any shipper or description of traffic to any undue or unreasonable prejudice or disadvantage. Section 1 declared that the act applies only to transportation which is interstate or foreign; this limitation on the act's application was reaffirmed in the following proviso:

> *Provided, however,* That the provisions of this Act shall not apply to the transportation of passengers or property * * * wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid * * *.[11]

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[10] The case arose in 1911 before this authority was expressly conferred upon the Commission by the Transportation Act of 1920, c. 91, 41 Stat. 484 (49 U. S. C., sec. 13 (4)).

[11] Sec. 1 of the Act of February 4, 1887, 24 Stat. 379 (49 U. S. C., sec. 1 (2)). The quoted language was reenacted without change by the Acts of June 29, 1906 (34 Stat. 584), and June 18, 1910 (36 Stat. 544).

This Court (p. 358) construed the above proviso as limited to "exclusively intrastate traffic, separately considered; to the regulation of domestic commerce, as such" and as therefore inapplicable to a discrimination against interstate trade arising "from the relation of intrastate to interstate rates." The Court said (pp. 358–359):

> Such a matter is one with which Congress alone is competent to deal, and, in view of the aim of the act and the comprehensive terms of the provisions against unjust discrimination, there is no ground for holding that the authority of Congress was unexercised and that the subject was thus left without governmental regulation.

The same considerations of policy and constitutional power apply in the present case, and also the same consideration of statutory purpose. The Interstate Commerce Act was designed to keep interstate transportation free from discriminatory rates and the Federal Trade Commission Act is designed to keep interstate commerce free from unfair methods of competition. The prohibitions of the two statutes are stated in equally broad terms—in the former the prohibition is stated as applicable to interstate transportation and in the latter it is stated as applicable to competition in interstate commerce. Intrastate transportation producing the kind of injury to interstate commerce which the Interstate Commerce Act was designed to protect against fell within the regulatory provisions of that act, notwithstanding an express exemption of transportation "wholly within one State." *A fortiori,* under the Federal Trade Commission Act, which contains no such

express exemption, intrastate conduct resulting in the injury to interstate competition which the act is designed to protect against should be held to be within its provisions.

American Can Co. v. *Ladoga Canning Co.*, 44 F. (2d) 763 (C. C. A. 7), certiorari denied, 282 U. S. 899, is closely analogous to the issue here. It was a suit to recover triple damages for injury alleged to have been caused by defendant's violation of section 2 of the Clayton Act. At that time section 2 provided: [12]

> It shall be unlawful for any person engaged in commerce,[13] *in the course of such commerce,* either directly or indirectly to discriminate in price between different purchasers of commodities * * * where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce * * *.

The evidence showed that the defendant sold cans to a competitor of the plaintiff at prices substantially lower than those which it charged the plaintiff. It also showed that 99% of defendant's sales to this competitor were intrastate. Although the phrase "in the course of *such* commerce" seems clearly to refer to the commerce of the discriminator, the court held that it likewise refers to the commerce of the party receiving the benefit of the discriminatory price and that the statute is

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[12] Sec. 2 of the Act of October 15, 1914, c. 323, 38 Stat. 730 (15 U. S. C., sec. 13). Section 2 was later radically amended by the Act of June 19, 1936, known as the Robinson-Patman Act, c. 592, 49 Stat. 1526 (15 U. S. C., Supp. V, sec. 13 (a)–(f)).

[13] Section 1 provides that the word "commerce," as used in the Act, means interstate or foreign commerce.

violated if the commerce of the *latter* is interstate. The court said (p. 770):

> Bearing in mind that the restraint through discriminations which is condemned by the aforementioned section 2 is upon "the freedom of competition in the channels of interstate trade which it has been the purpose of all the anti-trust acts to maintain," it is apparent that "in the *course* of such commerce" cannot be narrowly restricted to sales made by the discriminator, but includes the commerce of the purchaser receiving the price discrimination.

6. Respondent has contended that its interpretation of the Federal Trade Commission Act is supported by certain action taken by Congress with respect to amendment of the act. By the Act of March 21, 1938 (52 Stat. 111), Congress made various procedural changes in the act and also amended the first paragraph of section 5 so as to extend its prohibition to "unfair or deceptive acts or practices in commerce".[14] Three years earlier the Senate, while considering bills on the calendar to which there was no objection, passed a bill (S. 944) which amended the first paragraph of section 5 so as to make it prohibit unfair methods of competition "in or affecting commerce" and unfair or deceptive acts or practices "in or affecting commerce".[15] The words "in

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[14] The bill (S. 1077) which became the Act of March 21, 1938, was identical with a bill which the Senate had passed during the Seventy-fourth Congress (S. Rept. No. 221, 75th Cong., 1st Sess., p. 1).

[15] The bill made a corresponding change in the second paragraph of section 5, but did not otherwise amend the Trade Commission Act.

or affecting commerce" were used instead of "in commerce" in order "expressly" to extend the Commission's otherwise "doubtful" jurisdiction to deal with unfair methods of competition and unfair or deceptive acts and practices "which, although done in intrastate commerce, seriously affect honest competitors engaged in interstate commerce" (S. Rept. No. 46, 74th Cong., 1st Sess., p. 1). Senator Wheeler, who was in charge of the amendment, explained on the floor of the Senate that "This is simply a clarifying amendment. * * * the bill does not change the present law" (79 Cong. Rec. 1843). However, after the bill had been passed by unanimous consent, Senator Austin asked its reconsideration. His main complaint was that the amendment would authorize the Commission to regulate "production" and that a change of this character "should not be passed upon a mere calling of the calendar and the inattention of Senators like myself who did not comprehend the scope of the bill" but "ought to have full consideration" (79 Cong. Rec. 1843). Senator Borah was uncertain whether or not the Act defined "commerce" to mean interstate commerce; if not, "then this measure ought to be amended (79 Cong. Rec. 1844). Senator Wheeler then said (79 Cong. Rec. 1844):

> Mr. President, so long as there seems to be some misunderstanding, I will allow the vote to be reconsidered, and then we will let the measure go over for the day.

The bill was not again brought forward for action by the Senate.

Plainly enough, this legislative episode, in which only four Senators participated, is irrelevant to the issue here. None of the Senators taking part in the colloquy expressed the opinion that under the law as it then stood the Commission did not have authority to deal with unfair methods of competition which injuriously affected those selling in interstate commerce in competition with an intrastate seller. In addition, mere reconsideration of the vote on a bill which had been passed by unanimous consent on the calling of the calendar does not constitute decisive or affirmative action with respect to its merits.

7. Finally, it is true that a few somewhat comparable statutes use the more elaborate term "in or affecting" interstate commerce.[16] These statutes, however, were passed by different Congresses, under different circumstances, and fall considerably short of showing a precision of phraseology sufficient to warrant restriction of section 5 of the Trade Commission Act to a scope narrower than that necessary to accomplish its purposes. As was clearly pointed out in *United States* v. *Stewart*, No. 13, this Term, decided November 12, 1940, "No mere collation of other statutes can be decisive in determining what the instant statute means. The meaning of each phrase must be closely related to the time and circumstance of its use." Moreover, in none of these other statutes is the subject matter of

[16] National Labor Relations Act, secs. 2 (7), 9 (c), 10 (a), c. 372, 49 Stat. 450, 453 (29 U. S. C. Supp. V, secs. 152 (7), 159 (c), 160 (a)); Bituminous Coal Act, sec. 4, c. 127, 50 Stat. 76 (15 U. S. C. Supp. V, sec. 831); Civil Aeronautics Act, sec. 1, c. 601, 52 Stat. 977 (49 U. S. C. Supp. V, sec. 401).

regulation "unfair competition", where the victim may be engaged in interstate commerce while the culprit is not. An unfair labor practice, for example, would not necessarily be "in" interstate commerce because it affected that commerce. But, as we have shown, unfair competition by its nature is "in" interstate commerce whenever the injured competitor is engaged in interstate commerce.

CONCLUSION

It is respectfully submitted that the judgment of the court below should be reversed, with directions to affirm the order of the Federal Trade Commission.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 10[illegible] 85

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

BUNTE BROTHERS, INC.,
Respondent.

RESPONDENT'S ANSWER AND BRIEF IN SUPPORT THEREOF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 1021

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

BUNTE BROTHERS, INC.,
Respondent.

RESPONDENT'S ANSWER AND BRIEF IN SUPPORT THEREOF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Answering the petition of Federal Trade Commission, for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, the respondent, Bunte Brothers, Inc., respectfully states that the writ of certiorari should not issue out of this court to review the decree of the United States Circuit Court of Appeals for the Seventh Circuit, entered on February 20, 1940, in which decree the court vacated and set aside an order of the Federal Trade Commission requiring the respondent to cease and desist from alleged unfair methods of competition in connection with intrastate sales of merchandise within the State of Illinois.

Statement.

So that this court may have before it at once the exact terms of the Federal Trade Commission's order to cease and desist, which was vacated by the decree of the Circuit Court of Appeals, it is herewith set forth in *haec verba*:

"It Is Ordered that the respondent, Bunte Brothers, Inc., a corporation, its officers, directors, agents, representatives and employees, in the offering for sale, sale and distribution of candy, in the State of Illinois, do cease and desist from:

"(1) Selling and distributing to dealers candy or other confections so packed and assembled that sales of such candy or other confections to the general public are to be made or may be made by means of a lottery, gaming device or gift enterprise;

"(2) Supplying to or placing in the hands of dealers assortments of candy or other confections which are used or which may be used without alteration or rearrangement of the contents of such packages or assortments to conduct a lottery, game of chance or gift enterprise in the sale and distribution of candy or other confections contained in said assortments;

"(3) Packing or assembling in the same assortment of candy for sale to the public at retail, pieces of candy of uniform size and shape with different colored centers, together with larger pieces of candy, which said larger pieces of candy are to be given as prizes to the purchasers procuring pieces of candy with centers of particular colors.

"It Is Further Ordered that the respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order" (R. 318).

It is thus immediately seen that the acts enjoined by the order of the Commission are intrastate in every aspect. The restraint imposed upon respondent by the Commission's order relates to respondent's intrastate activities as to goods manufactured in Illinois, packed in Illinois, sold in Illinois and consumed in Illinois. In considering petitioner's statement of the case (Petition p. 3) it must be borne in mind, therefore, that every questioned act and transaction of respondent is invested with this intrastate character.

Petitioner's assertions as to the morals or ethics of respondent's intrastate business have no place in this proceeding. The findings of fact by the Commission were challenged in the Circuit Court of Appeals as vague and unsupported conclusions. They were challenged, moreover, upon the ground that they did not constitute jurisdictional foundation for the order to cease and desist. The court below, however, did not adopt these findings but examined the case as presenting, essentially, a question of law involving the interpretation of the Federal Trade Commission Act. It is this construction of the statute which petitioner seeks to review. Should the necessity again arise respondent will, of course, reassert its position as to the insufficiency of the findings of fact to sustain the jurisdiction of the Commission under any construction of the Act.

The actual issue decided by the court below is clearly reflected in the following quotations from the court's opinion:

> "Our question may be stated thus: Is an order directed to an Illinois candy manufacturer engaged in distributing its product in the State of Illinois valid, which commands it to cease and desist from certain unfair practices in the sale and distribution of its candy *in the State of Illinois?*" (110 Fed. (2d) 414.)

Answering this question, the court concluded:

> "That the phase of petitioner's business wherein its practices are unfair is wholly intrastate. It is a phase of petitioner's business which is conducted wholly in Illinois, by an Illinois corporation, which makes and sells its product in Illinois. It is not within the purview of Section 5 of the Federal Trade Commission Act." (110 Fed. (2d) 416.)

In deciding the instant case upon the ground that the order of the Commission, on its face, attempted to regulate purely local sales of the respondent over which the Commission had no jurisdiction, the Circuit Court did not stop to consider the sufficiency of the findings of the Commission. In other words the court's conception of the controversy presented to it for decision did not embrace the consideration of the findings of fact, their jurisdictional sufficiency or the evidence upon which the findings were predicated. Conceding the question to be one of law, the court found it unnecessary to analyze the findings or the evidence, a step in the judicial process which would have been necessary only in the event that the court gave to the statute the broad construction urged by the Commission. Had the court agreed with the Commission and given the statute the extended scope requested, then only would it have been necessary for the court to give consideration to, and to pass upon the sufficiency of, the findings of fact, challenged as they are by the respondent.

Question Presented.

The statement of the question presented, appearing on page 2 of the petition, does not, in its generality, adequately specify the issues necessary to a complete decision of the controversy. As phrased by petitioner, the

question assumes evidentiary support for the findings by the Commission. This assumption appears in the language contained in the question, "which reduce the quantity and divert the course of interstate sales and shipments". The reduction in quantity and the diversion of commerce is thus assumed by petitioner's question to be the direct rather than the indirect or incidental consequence of respondent's intrastate practices, without regard to the presence or absence of additional evidence proving the necessary causal connection between such practices and the alleged reduction and diversion.

A complete review of the validity of the order of the Commission which was vacated by the Court of Appeals would include, therefore, the determination of the following question:

> Are purely local trade practices which through local competition result in incidental reduction of the quantity of interstate sales, such activities as would come within the scope of a federal regulatory statute even if such statute attempted to control intrastate acts affecting interstate commerce?

Should the necessity arise, as has been said, respondent will argue its views upon this subject. For the purpose, however, of passing upon this application for the writ of certiorari, it is probably necessary to decide only the following question:

> Did Congress, under the language of Section 5 of the Federal Trade Commission Act, invest the Commission with jurisdiction over methods of competition not practiced in the course of interstate commerce but which, on the contrary, are used wholly in connection with intrastate transactions and which, at most, affect, in some manner, the business of others engaged in interstate commerce?

ARGUMENT AGAINST GRANTING THE WRIT.

I.

The case presented by the petition and the question involved are not of such general public importance as necessitate review and decision by this court.

In assigning as the reason why this court should grant the writ of certiorari, petitioner asserts that the question presented is of public importance meriting review by this court. Petitioner alleges that the Federal Trade Commission Act "was intended to protect all interstate competition from the evils of unfair practices." This *petitio principii* assumes that such alleged unfair practices did themselves cross state lines as they did in *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, the decision relied upon by petitioner in this connection (Petition p. 6).

In the *Raladam* case, this court succinctly stated the necessary prerequisites of the Commission's jurisdiction as follows:

> "(1) That the methods complained of are unfair; (2) that they are methods of competition in commerce; (3) that a proceeding by the Commission to prevent the use of the methods appears to be in the interest of the public" (pages 646, 647).

It must be assumed that the legislature in enacting the statute recognized as being of public importance those things which the scope of its own language covered. It is not enough merely to state that a case presents a ques-

tion of public importance. It must disclose an issue of public importance in matters within the contemplation of a given statute. Innumerable questions are conceivable of the gravest national concern which properly commend themselves to legislative consideration. But, until the legislature has acted, they are not matters for the courts to consider. The effort of the Commission to stretch the empowering clause of the Act may be of importance to the Commission in its attempt to enlarge its jurisdiction, but it does not constitute that sort of public importance arising in cases under statutes already enacted and properly presentable for decision to the courts.

The asserted claim of public importance does not arise out of the necessity of protecting interstate commerce but is, rather, a self-created slogan whereby the Commission, whose powers have been limited by Circuit Courts of Appeals and by this court and, indeed, by the Congress itself, persists in its demand for a jurisdiction so enlarged that it would cover almost any imaginable phase of commerce, whether interstate or intrastate in nature.

In *Federal Trade Commission* v. *Raladam Co.*, it is to be noted that one of the necessary prerequisites of the Commission's jurisdiction is that the methods complained of "are methods of competition *in commerce.*" "Commerce," of course, must be understood as "*interstate commerce*" according to the language of Section 4 of the statute.

In the later case of *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, this court itself restated the second prerequisite of the Commission's jurisdiction, changing the expression "in commerce" to the phrase "in *interstate* commerce," making the clause read that the methods complained of "are methods of competition in interstate commerce." (Opinion p. 216.)

This court, in the *Raladam* case, was careful to state that:

> "Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable, they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions." (Page 649.)

If it be true, as petitioner contends, that the decision below severely limits the power of the Commission to protect interstate commerce, such limitation results from deliberate Congressional definition. The contention, therefore, that a question is presented of "first importance" to the Federal Trade Commission constitutes no legitimate reason for review by this court. The instant effort of the Federal Trade Commission to enlarge its power beyond its grant of authority was repelled by the decision of the Circuit Court of Appeals. After this reiteration of the limitation of the Commission's jurisdiction, no issue necessitating a decision by this court remains.

II.

The decision of the court below followed the settled law as to which there is no conflict.

It is conceded that the merchandising methods of the respondent enjoined by the cease and desist order of the Commission did not cross state lines, but were wholly intrastate in nature. To sustain the order, therefore, it became incumbent upon petitioner to take the position that these intrastate practices, while not performed "in commerce" (meaning in interstate commerce), did, never-

theless, affect interstate transactions of would-be competitors. The court below concluded that the language of Section 5 of the Federal Trade Commission Act, "in commerce," was not the equivalent of "affecting interstate commerce", but, on the contrary, referred to activities themselves practiced in interstate commerce.

In so deciding, the Circuit Court of Appeals followed the specifically expressed intent embodied in the Act itself by the Congress in the terms of the enactment. It followed and observed, moreover, the distinction between the language "in commerce" and "affecting interstate commerce" announced by this court in *Schechter* v. *United States,* 295 U. S. 495, where the court held that the words "in" and "affecting" have different connotations and that the term "affecting interstate commerce" conferred certain powers over intrastate activities, while the term "in commerce" restricts the scope of the statute to activities in the current or flow of interstate commerce. This portion of the opinion by this court has been in no way modified by its later decisions (opinion 542, 544).

As has been heretofore pointed out (*supra*), this court, in *Federal Trade Commission* v. *Raladam Co.,* 283 U. S. 643, 646, and in *Federal Trade Commission* v. *Royal Milling Co.,* 288 U. S. 212, 216, again unmistakably asserted that, "To come within the condemnation of the statute methods charged as unfair must be 'methods of competition *in interstate commerce.*'" (Italics supplied.)

Hewing to the line thus established by this court, the court below said: (*Bunte Bros.* v. *Federal Trade Commission,* 110 Fed. 2d 414):

> "We are on secure and undisputed ground, when we assume that an order of the Commission to be valid must be supported by evidence which establishes: (1)

The methods used are unfair; (2) The methods of competition condemned must be used in interstate commerce; (3) The proceeding by the Commission to prevent the use of the methods must be in the interest of the public. *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 216, 53 S. Ct. 335, 77 L. Ed. 706."

Confronted by the limitation upon its power in the language of the Act and by the decisions of this court as well as by the decisions of various Circuit Courts of Appeals, attempt was made, at the behest of the Federal Trade Commission, to amend the Act, to make it apply to unfair methods of competition *"in or affecting"* interstate commerce. On reconsideration of Senate Bill 944, 74th Congress First Session, the language "in or affecting" commerce was objected to as too broad in scope. (Congressional Record, Vol. 79, pt. 2, pp. 1842, *et seq.*)

The Bill was re-introduced during the Second Session of the 74th Congress (Senate Bill 3744) with the words "or affecting" significantly and deliberately left out. This is the statute which was finally adopted in 1938 (52 Stat. 111).

Thus, it appears that Congress was fully aware of the distinction between the language "in commerce" and "affecting commerce." Its original enactment had been construed by the Supreme Court which observed and confirmed the original legislative definition. After all of which, the Congress, being fully advised, rejected as too broad and all-inclusive the expression "affecting commerce."

The decisions relied upon by petitioner as being in conflict with the decision of the court below fail to sustain petitioner's contention that such a conflict exists. To constitute a conflict of decisions, it is, of course, necessary that

these decisions deal with substantially like situations and decide substantially identical questions. It should, therefore, be remembered that the decision of the court below dealt with certain local sales practices by a single candy manufacturer whose product was made, sold, distributed and consumed within the State of Illinois.

On the other hand, in *National Harness Mfrs.' Association* v. *Federal Trade Commission*, 268 Fed. 705, which is relied upon by petitioner as conflicting with the decision of the court below (petition p. 7), there existed a nationwide conspiracy between the members of the Association in violation of the Sherman Anti-Trust Act. The respondent, *Wholesale Saddlery Association*, consisted of persons and concerns engaged in selling harness and saddlery goods in interstate commerce throughout the various states and territories of the United States. The respondent, *National Harness Mfrs.' Association*, was composed of concerns who purchased their supplies of harness and saddlery goods from wholesalers and jobbers in interstate commerce, including members of the Saddlery Association. It was found that the officers and members of both associations co-operated by means of combinations and agreements extending throughout the various states to impose certain restrictions upon the interstate business in harness and saddlery goods (page 710).

The facts in that case are, therefore, so plainly dissimilar from the facts in the instant case that the language of the court quoted by the petitioner has no applicability. Moreover, when the quoted portion of the opinion is read in its context, it appears that this language of the court was merely in answer to the contention that the challenged activities of the respondent did not constitute *commercial* activities. This contention the court answered by referring to the cases of *Loewe* v. *Lawlor*, 208 U. S. 774; *Eastern*

States Lumber Co. v. *United States*, 234 U. S. 600; and *Nash* v. *United States*, 229 U. S. 373, where it was held that persons conspiring with the intention of restraining interstate commerce are guilty of violating the Sherman Anti-Trust Act without being themselves engaged in a commercial occupation.

Since the Commission, of course, has power to institute a proceeding for a violation of the Sherman Act, the court was clearly correct in affirming the cease and desist order based as it was upon a proved infringement of the Sherman Act.

Chamber of Commerce of Minneapolis v. *Federal Trade Commission*, 13 Fed. 2d 673, (petition p. 7) involved a proceeding by the Commission charging that the members of the Chamber were engaged in a conspiracy among themselves and with others to boycott and refuse to deal with the St. Paul Grain Exchange or its members, or the Equity Co-operative Exchange, or the customers of any of them. Against the contention of respondents in that case that the Chamber was not engaged in interstate commerce, the court held that that body was "an instrumentality in the current of interstate commerce" and, consequently, that its members were engaged in the operation of an instrumentality of interstate commerce. In so holding, the court cited and relied upon previous adjudications by this court to the effect that stock or commodity exchanges, stockyards, etc., constitute channels or throats of the current or flow of interstate commerce. Hence, the practices complained of in the *Chamber of Commerce* case occurred directly *in the stream of interstate commerce which was handled and controlled by the respondents themselves.* This is diametrically opposed to the facts of the instant case in which the challenged commerce of the respondent is admittedly wholly intrastate.

In addition, in the *Chamber of Commerce* case, the court found that the officers and members of the respondent organization were engaged in a *conspiracy* to restrain interstate commerce, thus directly contravening the prohibitions of the Sherman Act. The proceeding of the Commission thus being founded upon a violation of the Sherman Act, the court employed language which had been developed in a series of decisions as defining the applicability of the Sherman Act to intrastate activities. It is familiar doctrine that in circumscribing the scope of the Sherman Act with relation to intrastate activities, the courts have developed the criterion that the indicted intrastate activities must affect interstate commerce. Having held that the respondent organization and the members thereof were engaged in the operation of an agency of interstate commerce, which alone was sufficient to establish jurisdiction of the Commission, the subsequent language of the court was unnecessary dictum which finds its explanation in the existence of a *conspiracy* affecting interstate commerce.

The broad and unnecessary *obiter dictum* quoted in italics in the petitioner's brief (page 8) must be considered in connection with the particular instrumentality under investigation. This instrumentality was held to be "in the current of interstate commerce". The Chamber, while intrastate in position and physical immobility, was interstate in purpose and operation. It was a turntable on an interstate track. If the italicized language relied upon could be disassociated from the other language of the opinion (not italicized) designating the Chamber as an instrumentality in the current of interstate commerce, then, not only would the opinion conflict with other opinions by other Circuit Courts of Appeals, it would run counter, also, to the statute itself and with the decisions of this court.

It may be well at this point to observe a bit of practical, legal philosophy long ago announced by this court and from which no departure has ever been suggested. Chief Justice Marshall stated in *Cohens* v. *Virginia,* 6 Wheat. 264, 399, 5 L. Ed. 257, 290:

> "The counsel for the defendant in error urge, in opposition to this rule of construction, some dicta of the court, in the case of *Marbury* v. *Madison.*
>
> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

To the same effect is *Humphrey* v. *U. S.,* 295 U. S. 602, 627.

The cases cited by petitioner being essentially dissimilar from the case before the court below, there exists no conflict between the Circuit Courts of Appeals in the application of the Federal Trade Commission Act to local sales methods of the kind here in question. Intrastate transactions affecting interstate commerce have been held to come within the jurdiction of the Federal Trade Commission only if the proceeding was based upon the Sherman Act finding a conspiracy or other concerted action with the intent to restrain or monopolize interstate commerce. In flat contradiction of the unsupported contention of

petitioner, there is practical unanimity in the Circuit Courts in the construction of this phase of the Federal Trade Commission Act. The courts have consistently adhered to the language of the statute and the pronouncements of this court by rejecting the attempts of the Federal Trade Commission to extend its jurisdiction to intrastate transactions on the mere ground that they affected interstate commerce.

In *California Rice Industry* v. *Federal Trade Commission* (C. C. A. 9th), 102 Fed. (2d) 716, the Commission attempted to prohibit the fixing of quotas of rice which the respondents might mill or process. The court denied the asserted jurisdiction over these intrastate practices, saying, at page 723:

> "Undoubtedly the fixing of such quotas 'affects' the volume of rice which after milling is sold and delivered into interstate commerce, but unlike the National Labor Relations Act the Federal Trade Commission Act does not create a control in the Commission of practices both 'affecting' interstate commerce and 'in' interstate commerce. Since the Commission's authority is confined to transactions, 'in' interstate commerce, paragraph '5' of its order to cease and desist from fixing or determining the quotas or percentages of the rice crop that the Miller respondents may mill or process * * *' is beyond its jurisdiction and void."

In *Ward Baking Co.* v. *Federal Trade Commission* (C. C. A. 2d), 264 Fed. 330, there was an attempted exercise of jurisdiction over the practice of giving premiums in the sale of bread within the state of Rhode Island. Overruling the order of the Commission, the court said, at page 331:

> "Doubtless bread sold in Massachusetts to be delivered to the purchaser in Rhode Island would be

interstate commerce, but that is not this case. Moreover, the Commission is not finding the act of transportation from Massachusetts to Rhode Island unfair, but *the method of local sales* made in Rhode Island. If the respondent had its own stores in Rhode Island, and carried to them from Massachusetts bread to be there sold, *this method of selling could not be considered interstate commerce.*" (Italics supplied.)

To the same effect see: *Winslow* v. *Federal Trade Commission* (C. C. A. 4th), 277 Fed. 206; *Utah-Idaho Sugar Co.* v. *Federal Trade Commission* (C. C. A. 8th), 22 Fed. 2nd. 122, 125; *Canfield Oil Co.* v. *Federal Trade Commission* (C. C. A. 6th), 274 Fed. 571, 574, 575; *Federal Trade Commission* v. *Claire Furnace Co.* (C. C. Dist. of Col.), 285 Fed. 936, 941 (reversed in 274 U. S. 160 on the distinct ground that the lower court improvidently granted an injunction, plaintiff having an adequate remedy at law).

III.

The decision below is wholly consistent with decisions construing other statutes regulating interstate commerce.

Petitioner's contention that the decision below conflicts with cases involving other statutes regulating and protecting interstate commerce is without foundation. Any attempt to compare decisions arising under the Federal Trade Commission Act with cases involving other federal regulatory statutes must take into consideration the purpose of the particular statute and the language by which Congress defined the field of regulation intended to be covered by the statute. It will be seen that in many statutes Congress deliberately employed language defining their scope differently from the jurisdiction of the Federal Trade Commission.

The National Labor Relations Act (49 Stat. 449, 29 U. S. C. Sec. 151) empowers the National Labor Relations Board:

> "To prevent any person from engaging in any unfair labor practice *affecting* commerce." (Italics supplied) (49 Stat. 453, Sec. 10(a); 29 U. S. C. Par. 160(a).)

The Act further provides:

> "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce, or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." (40 Stat. 450, Sec. 2(7); 29 U. S. C. Par. 152 (7).)

The term "commerce" is defined as meaning, "trade, traffic, commerce, transportation or communication among the several States", etc. (49 Stat. 450, Sec. 2(6); 29 U. S. C. Par. 152(6).)

Thus Congress expressly recognized the distinction between jurisdiction over practices "in commerce" and practices "affecting commerce". In *Apex Hosiery Co.* v. *Leader* (decided May 27, 1940, 84 L. Ed. 913 (Advance sheets) 917), *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 607 and *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1, 31, this court emphasized the broad jurisdiction conferred upon the National Labor Relations Board by the phrase "affecting commerce" as distinguished from the scope of other federal statutes. To the same effect see:

Blankenship v. *Kurfman* (C. C. A. 7), 96 Fed. (2d) 450, 456;

Leader v. *Apex Hosiery* (C. C. A. 3), 108 Fed. (2d) 71, 81 (affirmed by this court in *Apex Hosiery* v. *Leader*, May 27, 1940).

The Federal Employers' Liability Act of 1908 (35 Stat. 65; 45 U. S. C. Sec. 51) provides that:

> "Every common carrier by railroad while engaged in commerce between any of the several States or territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * *." (Sec. 1; 46 U. S. C. Par. 51.)

In construing the scope of this Act the phrase "employed in interstate commerce" has authoritatively been held to mean that the injured employee, at the time of the injury, must be actually engaged in interstate transportation, or in work so closely related to it as to be practically part of it. The employment in occupations which ultimately affect the interstate movement of goods was held insufficient to invoke this Act.

See:

Shanks v. *Delaware L. & W. R. Co.*, 239 U. S. 556, 558.

Erie R. Co. v. *Welsh*, 242 U. S. 303, 306.

Chicago & Eastern Illinois R. Co. v. *Industrial Commission*, 284 U. S. 296, 299.

By an enactment of the utmost significance in considering the intention of Congress when using the phrase "in commerce" or "affecting commerce", Congress, in 1939, amended the first section of the Employers' Liability Act by adding the following provision:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way

directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases' (approved April 22, 1908), as the same has been or may hereafter be amended." (53 Stat. 1404.)

Considering that the term, "employed in interstate commerce", needed enlargement, Congress thus provided for the inclusion in the statute of occupations affecting commerce by expressly extending the application of the Act to employees whose duties "shall, in any way directly or closely and substantially, *affect* such commerce."

The Fair Labor Standards Act (52 Stat. 1060; 29 U. S. C. Secs. 205, 207) governs every employee "who is engaged in commerce or in the production of goods for commerce". The phrase "engaged in commerce" has been held not to cover occupations affecting interstate commerce. See *U. S.* v. *F. W. Darby Lumber Co.* (D. C. S. D. Ga.), 32 Fed. Sup. 734, 737.

The Interstate Commerce Act (41 Stat. 474; 49 U. S. C. Sec. 1) applies generally "to common carriers engaged in—(a) the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are carried under a common control, management, or arrangement for a continuous carriage or shipment; * * *" (Sec. 1 (1a), 49 U. S. C. Par. 1 (1a)). Viewing common carriers as essential agencies for the movement of interstate commerce, Congress thus subjected, *a priori,* all common carriers to the jurisdiction of the Interstate Commerce Commission.

Section 2 provides for the application of the Interstate Commerce Act to the transportation of passengers and property and transmission of intelligence. In a proviso to this section an exception is made with respect "to the transportation of passengers or property, or to the receiving, delivery, storage or handling of property, wholly within one state and not shipped to or from any foreign country from or to any place in the United States as aforesaid; * * *." The effect of this proviso is to exempt transportation which is established to be wholly within one state from the scope of the Act which, *a priori*, vests the Interstate Commerce Commission with jurisdiction over all transportation of passengers and property.

Thus in the broad language of the Interstate Commerce Act is found express legislative sanction for the establishment and regulation of intrastate rates, unless such rates concern charges for transportation wholly intrastate, having no contact or connection with, or influence upon, the dominant interstate character of the common carrier.

In the *Shreveport Rate* Case (*Houston & Texas Railway Co.* v. *United States*), 234 U. S. 342, which is relied upon by petitioner as inconsistent with the construction of the Federal Trade Commission Act by the court below (petition p. 9), the Interstate Commerce Commission, in a proceeding against the Houston, East & West Texas Railway Company and the Houston and Shreveport Railroad Company, found that the carriers maintained unreasonable rates in their interstate transportation from Shreveport, Louisiana, to various points in Texas. The Commerce Commission consequently established the maximum class rates for this interstate traffic. These interstate rates from Shreveport to certain points in Texas were higher than rates charged by the carriers from cities in Texas to such points under substantially similar con-

ditions and circumstances. The Interstate Commerce Commission found:

> "That thereby 'an unlawful and undue preference and advantage' was given to the Texas cities, and a 'discrimination' that was 'undue and unlawful' was effected against Shreveport."

The order of the Commission, therefore, first fixed and established the maximum class rates to apply to the interstate transportation of traffic from Shreveport, Louisiana, to named points in Texas. In connection with, and incidental to, this regulation of the interstate rates of the carriers, the order of the Commission directed the carriers:

> "to desist from charging higher rates for the transportation of any commodity from Shreveport to Dallas and Houston, respectively, and intermediate points than were contemporaneously charged by the carriage of such commodity from Dallas and Houston toward Shreveport for equal distances, as the Commission found that relation of rates to be reasonable."

It is to be noted that the interstate as well as the intrastate traffic regulated by this order of the Commission was carried on with the same trains serving interstate as well as intrastate transportation, on the same tracks leading from points outside of Texas to cities in Texas and serving also as connections between those cities within the State of Texas which were mentioned in the order.

This background of the order in question is illuminated by the following passages from the opinion of the court:

> "While these decisions sustaining the Federal power relate to measures adopted in the interest of the safety of persons and property, they illustrate

the principle that Congress, in the exercise of its paramount power, may prevent the *common instrumentalities of interstate and intrastate commercial intercourse* from being used in their intrastate operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a state, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled.

"This principle is applicable here. We find no reason to doubt that Congress is entitled to keep the highways of interstate communication open to interstate traffic upon fair and equal terms. That an unjust discrimination in the rates of a common carrier, by which one person or locality is unduly favored as against another under substantially similar conditions of traffic, constitutes an evil, is undeniable; and where this evil consists in the *action of an interstate carrier* in unreasonably discriminating against interstate traffic over its line, the authority of Congress to prevent it is equally clear. It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. *The use of the instrument of interstate commerce* in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention." (p. 353, 354) (Italics supplied.)

Having decided that the regulation of these intrastate rates was a necessary part of the regulation of the inter-

state rates and that such regulation came within the power which Congress had constitutionally vested in the Interstate Commerce Commission by Section 3 of the Act (24 Stat. 380), the court proceeded to consider the effect of the proviso to Section 1(2) of the Act providing that the Act shall not apply to the transportation of passengers or property wholly within one state. The Commerce Court had held:

> "That this proviso is a mere disclaimer of any intention on the part of Congress, in enacting the Act to regulate commerce, to exceed its constitutional power and that it was not designed to limit or confine the power which Congress could exercise—and, in our opinion, has exercised—in respect of such matters as are here in dispute. If this construction be correct, it follows that the proviso in no way prevents the application of the third section to the facts of this case, and, therefore, it was within the authority of the Commission to make the order in question." (205 Fed. 380, 384)

This Court, in affirming the decision of the Commerce Court, held that the carriers, being instrumentalities of interstate commerce, were subject to the jurisdiction of the Commission and that their intrastate rates in question, giving undue preference to certain localities, came within the language of the third section of the Act. It said:

> "This language is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn. There is no exception or qualification with respect to an unreasonable discrimination against interstate traffic produced by the relation of intrastate to interstate rates as maintained by the carrier." (P. 356)

Since the proviso to the first section of the Act constitutes an exception to the power generally conferred upon the Commission by the third Section of the Act, the court gave to it a strict construction as not derogating from the general powers of the Commission unless it should be shown to be applicable in letter as well as spirit.

> "These words of the proviso have appropriate reference to exclusively intrastate traffic, separately considered; to the regulation of domestic commerce, as such. The powers conferred by the act are not thereby limited where interstate commerce itself is involved. This is plainly the case when the Commission finds that unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by a carrier subject to the act." (P. 358)

In view of this reasoning of the court, the assertion of petitioner that the considerations and the rule laid down in the *Shreveport* case apply, *a fortiori*, to the instant case (petition p. 10) is, therefore, wholly unwarranted. Contrary to the Interstate Commerce Act, the Federal Trade Commission Act confers but a limited jurisdiction upon the Trade Commission. In construing the Trade Commission Act the court is required to consider not the effect of an exception to a general power vested in the Commission, but the meaning of that part of the statute which constitutes the grant of authority.

A railroad operating interstate occupies a significant and important position in the national economy. It is obliged to serve, at prescribed rates, anyone lawfully requesting its facilities. The basic structure of such institutions, both physically and financially, is determined by the interstate character of its business. Its rails or

lines run continuously across state borders. Its stations house under one roof all of the employees and paraphernalia necessary to handle both interstate and intrastate transportation. The same freight depots receive, load and unload goods moving interstate and goods moving in intrastate journeys. Its round houses and switching equipment are similarly used and its rolling stock moves across state lines with through passengers and freight and with passengers and freight of local destination. Its bonds and debentures are sold upon the basis of its total earnings.

When, therefore, the Interstate Commerce Commission comes to determine railroad rates, it must consider the carrier as a whole, its cost of operation, its earnings and its obligations. Hence some measure of control of local rates is inescapably necessary. Considerations of the same import apply, essentially, to steamship lines, telegraph and telephone companies and other media of transportation and transmission.

The attempt to regulate intrastate sales of penny bars of candy under a statute granting power to consider only acts and practices in interstate commerce are hardly comparable to the regulation of rates of national common carriers under an empowering statute of the breadth and scope of the Interstate Commerce Act.

The Clayton Act (38 Stat. 730; 15 U. S. C. Sec. 13) provides that:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchases of commodities of like grade and quality where either or any of the purchases involved in such discrimination are in commerce, * * * and where the effect of such discrimination may be to substantially

lessen competition or tend to create a monopoly in any line of commerce * * *"

It has consistently been held that in order to come within the ambit of this statute the person charged with violation thereof must have committed a discriminatory act in the course of interstate commerce. Allegations that the activities complained of affect interstate commerce are not sufficient. See:

Lipson v. *Socony-Vacuum Corp.* (C. C. A. 1), 76 Fed. (2d) 213, 216, 217.

Port & Co. v. *Girdler,* (N. Y. Supreme Court, November, 1939), CCH Trade Regulations No. 25,347.

American Can Co. v. *Ladoga Canning Co.* (C. C. A. 7), 44 Fed. (2d) 763, is alleged by petitioner to apply the Clayton Act on the ground that defendant's intrastate sales affected interstate commerce. In passing, it may be remarked that the opinion in that case was written by the same judge who rendered the opinion of the court below construing the language of the Trade Commission Act as not covering intrastate activities affecting interstate commerce. In the *American Can Co.* case it was found that the defendant company discriminated in its sales to purchasers inside the state as well as outside the state. The greater part of its product was sold to the VanCamp Company which maintained a factory in the same state in which defendant's plant was located. The VanCamp Company used the cans purchased from the defendant for food packing and in turn sold its product packed in said cans in interstate commerce, throughout the United States. The sales by the defendant which were alleged to be discriminatory thus initiated the interstate journey of defendant's product which was only temporarily inter-

rupted by the process of filling the cans in Van Camp's plant and from there continued its interstate movement. The court's conception of the sale of the cans by the defendant as a part of an intended and continuous current of interstate commerce is expressed beyond doubt in the following part of its opinion:

> "The tin cans were useless save as they might be used as containers for food stuffs. Both parties knew they were to be so used. They were sold with the understanding that the purchaser would use them to distribute goods in interstate commerce." (P. 771)

Moreover, in deciding that these sales by defendant were "in the course of interstate commerce", the court followed explicitly the stream of commerce doctrine laid down in *Stafford* v. *Wallace,* 258 U. S. 459, and *Swift* v. *United States,* 196 U. S. 375, and treated the packing industry of Van Camp as a channel or throat of commerce analogous to the stock yards. The *American Can* case, therefore, affords no basis for petitioner's contention that defendant's intrastate sales were held to constitute sales in the course of interstate commerce because of their effect upon such commerce.

In fundamental opposition to the facts of the *American Can Co.* case, the goods sold by respondent in the instant case are sold, as well as consumed, in the state of their origin. Their movement does at no time become a part of the stream of interstate commerce. Their circulation begins and ends within the boundaries of a single state. The decision of the *American Can Co.* case is, therefore, wholly inapplicable to the instant case.

As the last phase of its argument, petitioner suggests that the Federal Trade Commission Act was passed in order to supplement the Sherman Act and that the Trade

Commission Act could not be construed to be narrow in scope than the statute which it was designed to supp ment. There is, of course, no dispute about the fact th the Trade Commission Act was intended to supplem the Sherman Act and that the Trade Commission is e powered to enforce the Sherman Act. The Sherman A however, possesses a definite objective which is stated unmistakable terms in the language of the Act itself, S tion 1 of which provides:

> "Every contract, combination in the form of tru or otherwise, or conspiracy, in restraint of trade commerce among the several states, or with forei nations, is declared to be illegal." (26 Stat. 209; U. S. C. Par. 1)

Section 2 of the Sherman Act provides:

> "Every person who shall monopolize, or attem to monopolize, or combine or conspire with any oth person or persons to monopolize any part of the tra or commerce among the several states, or with forei nations, shall be deemed guilty of a misdemean * * *". (26 Stat. 209; 15 U. S. C. Par. 2)

The language of the foregoing provisions discloses th Congress was striking at contracts, combinations and co spiracies in restraint of trade or commerce and at m nopolies, actual or attempted or contemplated by a co bination or conspiracy. Section 1, therefore, in effe makes unlawful conspiracies in restraint of commerce, a Section 2 declares to be illegal the monopolization or co spiracy or attempt to monopolize trade or commerce. both sections the trade or commerce referred to is t trade or commerce *"among the several states or wi foreign nations"*.

Two distinct prerequisites have been evolved for the application of the Act: (1) There must be a combination, conspiracy or other concerted action to restrain commerce, or an actual monopoly or attempt to monopolize a business or industry; (2) The challenged activities must be aimed at interstate commerce and where these activities take place wholly within one state there must be an intention to restrain interstate commerce.

In the following group of cases, proceedings by the Federal Trade Commission were dismissed on the distinct ground that the evidence did not show a combination or other concerted action or a monopoly or an unlawful discrimination by the defendants:

Federal Trade Commission v. *Sinclair Refining Co.*, 261 U. S. 464, 473.

Federal Trade Commission v. *Curtis Publishing Co.*, 260 U. S. 568, 581.

Federal Trade Commission v. *Gratz*, 253 U. S. 421, 428.

B. S. Pearsall Butter Co. v. *Federal Trade Commission* (C. C. A. 7), 292 Fed. 720, 722.

Federal Trade Commission v. *Paramount Famous-Lasky Corp.* (C. C. A. 2), 57 Fed. (2d) 152, 157.

American Tobacco Co. v. *Federal Trade Commission*, 9 Fed. (2d) 570, 582.

In the following line of cases, actions under the Sherman Act were dismissed by reason of the fact that the intrastate activities on which the charges were based had primarily a local object and were not intended to restrain or monopolize interstate commerce:

Apex Hosiery Co. v. *Leader*, ... U. S. ..... (Decided May 27, 1940, 84 L. Ed. Advance Sheets 913).

Levering & Carrigues Co. v. *Morrin*, 289 U. S. 103, 107.

Moore v. *New York Cotton Exchange, et al.*, 270 U. S. 593.

Industrial Association of San Francisco v. *United States*, 268 U. S. 64, 80.

United Leather Workers v. *Herkert*, 265 U. S. 457, 471.

Blumenstock Bros. v. *Curtis Publishing Co.*, 252 U. S. 436, 442.

C. E. Stevens Co. v. *Foster & Kleiser Co.* (C. C. A. 9), 109 Fed. (2d) 764.

Foster & Kleiser Co. v. *Special Site Sign Co.* (C. C. A. 9), 85 Fed. (2d) 742.

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Blankenship v. *Kurfman* (C. C. A. 7), 96 Fed. (2d) 450.

Abouaf v. *Spreckels Co.* (D. C. Cal.), 26 Fed. Sup. 830, 833.

United States v. *Great Western Sugar Co.* (D. C. Neb.), 39 Fed. (2d) 149, 151.

United States v. *Southern California Wholesale Grocers Assn.* (D. C. Cal.), 7 Fed. (2d) 944, 947.

Andrew Jergens Co. v. *Woodbury* (D. C. Del.), 271 Fed. 43.

In the case at bar, admittedly, there is no evidence and consequently no finding that the respondent was guilty of either of the two prerequisite factors of liability, both of which are necessary to sustain a charge under the Sherman Act. Respondent did not participate in a conspiracy

or other concerted action, nor did it attempt to monopolize the business in which it was engaged. Respondent, moreover, had no intention of restraining interstate commerce, the sole object of its criticised practices being the sale of its goods within the State of Illinois. In the absence of these two essential elements of the Sherman Act the Commission has no jurisdiction over intrastate methods of competition.

CONCLUSION.

The Circuit Court of Appeals recognized the injunctive order of the Commission entered as the result of its own application and prosecution, as being a bid for authority to transgress the limitations of the statute which created it and, following the language of that Act and the binding decisions by this court, left the matter where it belongs, —with the Congress. Before that body, if the subject be regarded as of the commanding public importance claimed for it, an amendment may be enacted conferring such increased authority upon the Commission as the law-making department of the nation deems necessary.

Because the question presented by the petition has been authoritatively answered by both legislature and judiciary, it is urged that the petition for certiorari to the Circuit Court of Appeals of the Seventh Circuit be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 85

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

BUNTE BROTHERS, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT FOR BUNTE BROTHERS, INC., RESPONDENT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 85

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

BUNTE BROTHERS, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT FOR BUNTE BROTHERS, INC., RESPONDENT.

STATEMENT.

At the outset, it is to be observed that the record herein discloses no commercial practice of the Respondent intended to impair or impede the interstate business of others selling similar products. The cease and desist order of the Commission, for which approval is here sought, seeks to enjoin the Respondent from selling and distributing, supplying to or placing in the hands of dealers, and packing

or assembling, packages of candy or other confections which may be used to conduct a lottery, game of chance or gift enterprise in the sale and distribution of such merchandise to the ultimate consumer, all of which takes place in the State of Illinois (R. 318).

The distribution and sale of such merchandise *in interstate commerce* has heretofore been held unlawful under the Federal Trade Commission Act. It is not claimed by Petitioner that such practices are unlawful under any law of Illinois or under any law of the United States except the Federal Trade Commission Act. The sale and distribution of Respondent's merchandise is alleged to be unlawful only when it is brought into competition with the interstate business of outside sellers who may elect to seek a market for their goods in Illinois.

The court below, finding that Respondent's business under attack by the Commission was wholly *intrastate*, decided the case upon a single issue of law, treating, in its opinion, only the scope and effect of Section 5 of the Federal Trade Commission Act and, having concluded that the intrastate business of Respondent did not come within the purview of the statute, found it unnecessary to consider the sufficiency of the Commission's findings of fact.

The Question Presented.

In its petition for the writ of certiorari the Commission stated the question presented to this court as follows:

> "Does the Federal Trade Commission have power to prohibit unfair methods of competition in connection with intrastate sales which reduce the quantity and divert the course of interstate sales and shipments?" (Pet. p. 2).

In its brief, filed after the issuance of the writ, the Commission now formulates the question before this court as follows:

> "Whether the competition between companies selling in interstate commerce and a company selling in intrastate commerce is 'competition in (interstate) commerce' and whether the unfair methods used in such competition by the intrastate seller are 'unfair methods of competition in (interstate) commerce', within the meaning of the Federal Trade Commission Act" (Pet. Br. p. 2).

It will be noted that the question as presented in the petition for the writ of certiorari made the jurisdiction of the Commission depend upon the applicability of the Federal Trade Commission Act to unfair methods of competition in intrastate commerce which *affect* interstate commerce in such manner as to reduce the quantity and divert the course of interstate sales and shipments. The question as now presented seeks to avoid the distinction between methods of competition *in* interstate commerce and methods of competition *affecting* interstate commerce by isolating certain words of the statute which must be read and construed in their complete context.

The statute, unamended, under which this proceeding is prosecuted, reads:

> "Unfair methods of competition in commerce are declared unlawful.
>
> "The commission is empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce" (38 Stat. 719; 15 U. S. C. Sec. 45).

"Commerce" is defined as "commerce *among the several states* or with foreign nations, * * *" (38 Stat. 719; 15 U. S. C. Sec. 44).

It is thus apparent that the meaning of the words, "competition in interstate commerce," is not the question before this Court. The question is, rather, whether the Respondent, by its challenged practices, is "using unfair methods of competition in interstate commerce." Specifically applied to the facts of the case at bar, the question is whether the sale and distribution of merchandise which take place within one state only, can be considered as "using unfair methods of competition in [interstate] commerce."

ARGUMENT.

I.

ON ITS OWN ASSUMPTIONS PETITIONER FAILS TO SHOW THAT THE COMMISSION IS EMPOWERED TO REGULATE INTRASTATE SALES MERELY BECAUSE INTERSTATE COMPETITORS SEEK THE SAME MARKET.

Petitioner argues that because of the essentially two-sided nature of competition, competition in interstate commerce is present if but one of the competitors be engaged in interstate commerce. The statute does not predicate the jurisdiction of the Commission upon the presence of competition in interstate commerce, but authorizes it, only, to prevent persons from using unfair methods of competition in interstate commerce. However, even if this language of the statute be disregarded and jurisdiction of the commission be attached solely to competition in interstate commerce, it by no means follows that such competition is present when only one of the two necessary adversaries engages in interstate commerce. From Petitioner's own argument, the logical conclusion would seem to be that, in order to constitute competition in interstate commerce, which, by Petitioner's definition, necessarily requires at least two participants, both parties must operate in the field of interstate commerce.

Petitioner further argues that because of that two-sided character of interstate competition, the distinction between practices *in* interstate commerce and practices *affecting* interstate commerce, has no place in construing the scope of the Act, and that intrastate practices competing with interstate commerce come within the words

"competition in interstate commerce." In support of this contention, however, the Commission relies solely on cases arising under the Sherman Act which deal with intrastate activities *affecting* interstate commerce (the courts also having found that the practices there under consideration *directly* affected interstate commerce) and certain other cases upholding the jurisdiction of the Commission over intrastate practices *affecting* interstate commerce which violated the Sherman Act.

The third pillar of Petitioner's argument is that the Federal Trade Commission Act, being supplementary to the Sherman Act, should be so construed as to effectuate the policy of the earlier statute and should be given an equally wide application. The Sherman Act, however, was expressly designed to curb combinations and conspiracies in intentional restraint of interstate commerce. In the present proceeding, the Commission attempts to regulate standards of competition without any finding that there existed a combination or conspiracy in restraint of interstate commerce. The Sherman Act, moreover, was held to extend to intrastate combinations and conspiracies only if they "directly" affected interstate commerce, and the courts have held, without exception, that an incidental reduction of interstate commerce brought about solely by local competition, does not constitute a direct interference with interstate commerce.

It follows that even if the assumptions of Petitioner on which its argument is based, be taken as correct, they are insufficient to support the conclusion that the Federal Trade Commission Act authorizes the Commission to regulate intrastate sales on the ground that they are in competition with the business of others who are engaged in interstate commerce.

II.

SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT IS DIRECTED NOT AGAINST METHODS OF COMPETITION THEMSELVES INTRASTATE IN OPERATION OR AGAINST UNFAIR METHODS USED IN THE PURSUIT OF INTRASTATE BUSINESS BUT, RATHER, AGAINST THE USE OF UNFAIR COMPETITIVE METHODS IN FURTHERANCE OF THE USER'S INTERSTATE TRADE.

A.

In ascertaining the legitimate scope of jurisdiction of the Commission the first and principal guide is, of course, the language of the statute itself. It is to be assumed that in enacting this statute Congress used the words employed in their ordinary and commonly accepted meaning. *Deputy* v. *Du Pont,* 308 U. S. 488, 498.

By the language of the Act the Commission is empowered to prevent persons "from using unfair methods of competition in [interstate] commerce." It would be doing violence to the ordinary rules of grammar to say that this language covers the use of unfair methods of competition *with* the interstate commerce of others. The only possible deduction from this language is that the injunctive order of the Commission must pertain to unfair methods of competition which themselves are used in interstate commerce.

Petitioner argues that the question at issue before the court is concerned only with the meaning of the words "competition in commerce" (Pet. Br. p. 8), that competition between goods sold in intrastate and those sold in interstate commerce is competition "in" interstate commerce and that the use of unfair methods of distribution by one who sells intrastate in competition with interstate

commerce constitutes a use "of unfair methods of competition in interstate commerce" (Pet. Br. p. 9).

To arrive at this result it was necessary for Petitioner to sever the words "competition in commerce" from the clause in which they were used. The whole phrase "from using unfair methods of competition in commerce" permits of no such dissection, the language expressing, as it does, a single, coherent, legislative thought.

Having isolated the words, "competition in commerce" from the preceding language, "using unfair methods of", Petitioner proceeds to argue that the presence of "competition in interstate commerce" alone is sufficient to sustain the exercise of the Commission's jurisdiction whether or not the methods sought to be enjoined are used in interstate commerce. It contends, in effect, that the statute prohibits the use of "unfair methods *in* competition in interstate commerce." Even if the statute contained language to that effect, it does not follow that "competition in interstate commerce" exists although the Respondent's methods are not used in the course of interstate commerce. The phrase "competition in interstate commerce" implies logically that all of the contending forces which are necessary to constitute a competitive situation move and meet in interstate commerce.

The words "competition in commerce" cannot be given an independent jurisdictional meaning. The language of the empowering clause clearly limits the jurisdiction of the Commission to prevent respondents to its proceedings "from *using* unfair *methods* * * * in [interstate] commerce." As indicated by the connecting preposition "of", the word "competition" is employed in a descriptive sense as qualifying the "methods" which, if unfair, are preventable under the Act.

Without being further explained by the adjective phrase "of competition", the term "methods" would be meaningless. All "methods" adopted and used in the prosecution of interstate trade are not denounced by the statute. As was held in *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 649, to come within the prohibition of the Act, the methods must be "methods *of competition*".

The Wheeler-Lea Amendment, which was proposed and actively sponsored by members of the Federal Trade Commission, added to the statute the words, "and unfair or deceptive acts or practices in commerce." (52 Stat. 111; 15 U.S.C.A. Sec. 45.) The only purpose of this amendment was to give the Commission jurisdiction over unfair trade practices in interstate commerce without the necessity of proving the existence of, or injury to, competitors of the respondent.[1] It was not intended to effect any change with respect to the jurisdictional requirement appertaining to interstate commerce. Hence it is evident that the phrase, "unfair or deceptive acts or practices" was intended to serve as a basis for injunctive proceedings whenever, due to the absence of injury to competitors, the first clause of the statute relating to the use of unfair methods of competition should be unavailing. With respect to the presence of interstate commerce, both the unfair methods of competition and the unfair or deceptive acts or practices must be "in" interstate commerce.

B.

The courts in construing the Federal Trade Commission Act have uniformly recognized that the Commission is without authority to regulate methods of competition which are practiced merely in connection with respondent's intrastate business.

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[1] See Appendix A.

In *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 647, the prerequisites of the Commission's jurisdiction were stated as follows:

> "By the plain words of the act, the power of the Commission to take steps looking to the issue of an order to desist depends upon the existence of three distinct prerequisites: (1) That the methods complained of are unfair; (2) that they are methods of competition in commerce; and (3) that a proceeding by the Commission to prevent the use of the methods appears to be in the interest of the public."

In *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, the court, following the *Raladam* case, held at page 216:

> "To sustain the orders of the commission, three requisites must exist: (1) That the methods used are unfair; (2) that they are methods of competition in interstate commerce; and (3) that a proceeding by the commission to prevent the use of the methods appears to be in the interest of the public."

See, also, *Federal Trade Commission* v. *Mid West Mills*, (C. C. A. 7), 90 Fed. (2) 723, 724.

The limitation upon the power of the Commission to regulate only those unfair trade methods which are themselves practiced in interstate commerce is also recognized in:

California Rice Industry v. *Federal Trade Commission* (C.C.A. 9th), 102 Fed. (2d) 716, 723.

Ward Baking Co. v. *Federal Trade Commission* (C.C.A. 2d), 264 Fed. 330, 331.

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Canfield Oil Co. v. *Federal Trade Commission* (C.C.A. 6th), 274 Fed. 571, 574, 575.

See Appendix B for excerpts from above cases.

C.

It is a familiar rule that in ascertaining the scope and meaning of a statute, the construction placed upon it by continuous, administrative practice is of great weight.

Except for occasional excursions, the Commission, in exercising its powers and functions under the statute, followed a well-recognized path in selecting for prosecution and prosecuting only those alleged violators who were themselves engaged in interstate commerce. From such practical, uniform course of administration may be perceived the acceptance by the Commission of the view that it was empowered, only, to prevent parties engaged in interstate commerce from using unfair methods of competition in the pursuit of interstate business.

With respect to the particular trade practice involved in this case, it is also noteworthy that prior to the commencement of this proceeding the Commission had consistently confined its complaints and orders to the use of such practices by the respondent in connection with interstate sales and shipments. While, according to the theory advanced by Petitioner in this case, it is equally important to determine whether the injured competitor is engaged in interstate commerce and there is thus present a situation in which both parties participating in the competition are engaged in interstate commerce, the Commission, in the great majority of cases, did not consider it necessary

to make any findings as to whether or not the trade of the adversary was interstate in scope.[2]

D.

The unfounded assertion of Petitioner that the Federal Trade Commission Act governs intrastate sales when there exists a competitor who is engaged in interstate commerce, would, if accepted, create an anomolous situation. Under the first clause of Section 5, unfair methods of competition in interstate commerce are declared unlawful, but the unlawfulness of the sales methods of an intrastate operator, under Petitioner's contentions, is made dependent, not upon some inherent vice or illegality but, on the contrary, upon the advent of competition in the same market by another seller engaged in interstate commerce, a circumstance utterly beyond the control of the intrastate operator and as to which he would have no notice.

In other words, the construction contended for by the Commission, would make the lawfulness or unlawfulness of intrastate sales methods dependent upon the presence or absence of an interstate competitor who, at any time, might elect to cross the state line and compete with the intrastate operator whose trade practices theretofore were wholly lawful under the laws of the state wherein the business be transacted and lawful, indeed, even under federal law.

In contrast with this unpredictable and unknowable illegality of intrastate methods of competition, the "un-

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[2] See, *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304, 306; *Ostler Candy Co.* v. *Federal Trade Commission* (C.C.A. 10), 106 Fed (2d) 962, 964 (certiorari denied, 309 U. S. 675); *Bunte Bros.* v. *Federal Trade Commission*, 104 Fed. (2d) 996, 997; *Helen Ardelle* v. *Federal Trade Commission* (C.C.A. 9), 101 Fed. (2d) 718, 719; *Federal Trade Commission* v. *F. A. Martocio Co.* (C.C.A. 8), 87 Fed. (2d) 561, 562, 564.

fair or deceptive acts or practices" which were added to the statute by the Wheeler-Lea amendment, are clearly unlawful only when practiced in interstate commerce. Such result, which would inevitably follow from Petitioner's contention, would contradict the avowed purpose of the Wheeler-Lea amendment that the addition of the clause "unfair or deceptive acts or practices in commerce" was merely to dispense with the necessity of proving the existence of, or injury to, competitors.[3] Whether or not the competitor or competitors whose existence was deemed necessary prior to the amendment were engaged in interstate commerce, was regarded as immaterial in the consideration and adoption of the amendment.

It is reasonable to assume that the first clause of Section 5, relating to unfair methods of competition in commerce, and the second clause appertaining to unfair or deceptive acts or practices in commerce, both clauses being contained in the same sentence of the statute, were intended by Congress to possess the same scope of applicability to interstate commerce. The Wheeler-Lea amendment which makes it abundantly clear that any unfair acts or practices, to come within the jurisdiction of the Trade Commission, must be used in interstate commerce, can, therefore, be regarded as the legislative interpretation of the first clause of Section 5 in the sense that the unfair methods of competition therein described, must likewise be practiced in interstate commerce. (See *U. S.* v. *Stewart*, — U. S. — (decided November 12, 1940, 85 L. ed., Advance Opinions, pages 25, 28.)

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[3] See Appendix A.

III.

REFERENCE TO THE LEGISLATIVE HISTORY OF THE FEDERAL TRADE COMMISSION ACT AND TO ITS PURPOSE TO SUPPLEMENT THE SHERMAN ANTI-TRUST ACT, FAILS TO SUPPORT PETITIONER'S CONTENTION THAT THE FEDERAL TRADE COMMISSION ACT EMBRACES INTRASTATE SALES METHODS SUCH AS ARE INVOLVED IN THE CASE AT BAR.

Petitioner contends that the Trade Commission Act, being supplementary to the Sherman Anti-Trust Act, was aimed at all the familiar methods of law violation which prosecutions under the Sherman Act had disclosed, and that it should be given an equally wide application. From this it by no means follows, however, that Congress intended, at the time of the passage of the Federal Trade Commission Act, to give the Commission jurisdiction over intrastate sales of merchandise, the circulation of which is confined within the boundaries of a single state.

The reports and proceedings of Congress[4] make it evident that the methods of competition sought to be regulated by the statute were assumed to be methods of competition adopted by persons engaged in interstate commerce in furtherance of their own interstate operations. The question foremost in the mind of Congress was concerned with the creation of an administrative tribunal which by special training and experience would be particularly fitted to deal with the problem of maintaining the freedom of interstate commerce against trusts and monopolies.[5]

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[4] See Appendix C.

[5] Senate Report 597, 63rd Congress, 2nd Session, pp. 8, 13, 32, 38.

Another discussion of major importance was concentrated upon the meaning of the term "unfair methods of competition." The principal function of the administrative agency as conceived by Congress was to deal with the abuses of competition practiced by the giants of interstate commerce which threatened to absorb or eliminate their less powerful competitors. Throughout the congressional proceedings, it was never even suggested that the Commission should be authorized to interfere with sales methods which do not cross state lines. It is significant that the very name originally contemplated for the Commission was, "Interstate Trade Commission", which was abandoned only in order to avoid confusion with the Interstate Commerce Commission.[6]

An investigation of the circumstances of the passage of the Federal Trade Commission Act furnishes, therefore, no support for the contention that Congress intended to invest the Commission with jurisdiction over intrastate sales methods.

By relying on the Sherman Act as an aid in the construction of the Trade Commission Act, Petitioner attempts to go beyond the statute itself. It is a fundamental rule of construction that reference to extraneous materials cannot serve to place a construction on the statute inconsistent with its apparent meaning. But reference to the Sherman Act is of no help in determining the applicability of the Trade Commission Act to the issue at bar. The Sherman Act possesses a definite objective which is stated in unmistakable terms in the language of the Act itself, Section 1 of which provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or

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[6] Congr. Rec., Vol. 51, Part 15, p. 14924.

commerce among the several states, or with foreign nations, is declared to be illegal." (26 Stat. 209; 15 U. S. C. Sec. 1.)

Section 2 of the Sherman Act provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, * * * * ". (26 Stat. 209; 15 U. S. C. Sec. 2.)

The language of the foregoing provisions discloses that Congress was striking at contracts, combinations and conspiracies in restraint of trade or commerce and at monopolies, actual or attempted or contemplated by a combination or conspiracy. Section 1, therefore, in effect, makes unlawful conspiracies in restraint of commerce, and Section 2 declares to be illegal the monopolization or conspiracy or attempt to monopolize trade or commerce.

Two distinct prerequisites have been evolved for the application of the Act: (1) There must be a combination, conspiracy or other concerted action to restrain commerce, or an actual monopoly or attempt to monopolize a business or industry; (2) The challenged activities must be aimed at interstate commerce and where these activities take place wholly within one state there must be an intention to restrain interstate commerce.

Respondent has no quarrel with the proposition that the Commission is authorized to institute proceedings for violations of the Sherman Act. Where certain trade practices are violative of federal law because they contravene the prohibitions of the Sherman Act, they constitute, also, unfair methods of competition in interstate commerce within the scope of the Federal Trade Commission Act.

However, in the absence of a violation of the Sherman Act or of any other federal law for the protection of interstate commerce, the Trade Commission is authorized to enjoin trade practices which are considered unfair only if the Respondent is engaged in interstate commerce and uses the unfair methods in furtherance of his interstate business.

In the following group of cases, proceedings by the Federal Trade Commission were dismissed on the distinct ground that the evidence did not show a combination or other concerted action or a monopoly or an unlawful discrimination by the defendants:

Federal Trade Commission v. *Sinclair Refining Co.*, 261 U. S. 464, 473.

Federal Trade Commission v. *Curtis Publishing Co.*, 260 U. S. 568, 581.

Federal Trade Commission v. *Gratz*, 253 U. S. 421, 428.

B. S. Pearsall Butter Co. v. *Federal Trade Commission* (C. C. A. 7), 292 Fed. 720, 722.

Federal Trade Commission v. *Paramount Famous-Lasky Corp.* (C. C. A. 2), 57 Fed. (2d) 152, 157.

American Tobacco Co. v. *Federal Trade Commission*, (C. C. A. 2) 9 Fed. (2d) 570, 582.

In the following line of cases, actions under the Sherman Act were dismissed by reason of the fact that the intrastate activities on which the charges were based, had primarily a local object and were not directed at the restraint or monopolization of interstate commerce:

Apex Hosiery Co. v. *Leader*, 310 U. S. 469, 486, 490, 495, 498.

Levering & Garrigues Co. v. *Morrin*, 289 U. S. 103, 107.

Moore v. *New York Cotton Exchange, et al.*, 270 U. S. 593.

Industrial Association of San Francisco v. *United States*, 268 U. S. 64, 80.

United Leather Workers v. *Herkert*, 265 U. S. 457, 471.

Blumenstock Bros. v. *Curtis Publishing Co.*, 252 U. S. 436, 442.

C. E. Stevens Co. v. *Foster & Kleiser Co.*, (C. C. A. 9), 109 Fed. (2d) 764.

Foster & Kleiser Co. v. *Special Site Sign Co.* (C. C. A. 9), 85 Fed. (2d) 742.

Ewing-Von Almen Dairy Co. v. *C. & C. Ice Cream Co.* (C. C. A. 6), 109 Fed. (2d) 898.

Blankenship v. *Kurfman* (C. C. A. 7), 96 Fed. (2d) 450.

Abouaf v. *Spreckels Co.* (D. C. Cal.), 26 Fed. Sup. 830, 833.

United States v. *Great Western Sugar Co.* (D. C. Neb.), 39 Fed. (2d) 149, 151.

United States v. *Southern California Wholesale Grocers Assn.* (D. C. Cal.), 7 Fed. (2d) 944, 947.

Andrew Jergens Co. v. *Woodbury* (D. C. Del.), 271 Fed. 43.

In the case at bar, admittedly, there is no evidence and consequently there could be no finding, that the Respondent was guilty of either of the two prerequisite factors of liability, both of which are necessary to sustain a charge under the Sherman Act. Respondent did not participate in a conspiracy or other concerted action, nor did it attempt to monopolize the business in which it was engaged. Respondent, moreover, had no intention of restraining interstate commerce, the sole object of its criticized practices being the sale of its goods within the State of Illinois.

It follows as an inescapable conclusion that reference to the Sherman Act does not furnish a guide in determining the applicability of the Trade Commission Act to

methods of competition which do not themselves constitute combinations and conspiracies in restraint of trade. None of the cases cited or quoted from by Petitioner, at page 10 of its brief, supports the point in connection with which they are mentioned.

In *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, this court affirmed the decree of the Circuit Court of Appeals by which an order of the Federal Trade Commission was reversed for the reason that respondent had no substantial competition which was or could have been injured by use of the unfair methods. It is evident that the language quoted in Petitioner's brief was a mere dictum since the unfair methods of competition involved were practiced in interstate commerce. If the court had held, in accordance with Petitioner's argument, that the provisions of the Sherman Act could be used to enlarge the scope of the Federal Trade Commission Act, it might well have disregarded the absence of an injured competitor which is not required by the Sherman Act. The case affords a strong reason for the conclusion that, although the court said that Section 5 of the Trade Commission Act is supplementary to the Sherman Act, the power of the Trade Commission is, nevertheless, confined to the jurisdictional prerequisites which are to be found, not in the Sherman Act, but in the Trade Commission Act itself.

In *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463, the court likewise affirmed a judgment of the Circuit Court of Appeals vacating certain orders of the Federal Trade Commission for the reason that the challenged practices, while used in interstate commerce, were not against the public policy of the United States. Petitioner's quotation from the opinion of Mr. Justice McReynolds, if considered in its context, has not the remotest bearing upon the issue at bar.

In *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441, (in which Justices Holmes, Brandeis, McReynolds and McKenna dissented from the majority opinion) the court found that the respondent had adopted and enforced a nationwide scheme of fixing and maintaining certain specified standard prices at which its products were to be re-sold. This scheme, therefore, came directly within the prohibitions of the Sherman Act involving as it did concerted action with the intent to restrain interstate commerce and being plainly violative of federal public policy. It constituted an unfair method of competition in interstate commerce. The opinion as well as the actual holding of that case have no relevancy to the instant situation.

In *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304, the unfair methods of competition before the court involved the actual interstate sales and shipment in interstate commerce of chance candies. Since these practices did not come within the "familiar methods of law violation which prosecutions under the Sherman Act had disclosed," the language quoted by Petitioner is completely inconclusive as to the question now before this court.

The "great purpose" of the Sherman Act and of the other acts adopted by Congress to supplement the policy of the Sherman Act must be understood in the light of the specific language and provisions of these separate statutes.

Congressional intention of what is sought to be regulated is primarily ascertainable from its expressions in the particular statute invoked. If the Federal Trade Commission Act fails to carry into effect what Petitioner considers as its "great purpose", this does not furnish a reason for en-

larging the powers of the Commission beyond those conferred upon it by the express language of the Act itself.

Federal Trade Commission v. *Raladam Co.*, 283 U. S. 643, 649.

Riley Investment Co. v. *Commissioner of Internal Revenue*, — U. S. — (decided November 12, 1940, 85 Law ed., Advance Opinions, pp. 35, 37).

IV.

THE CONTENTION OF PETITIONER THAT INTRASTATE METHODS OF SALE COMPETING WITH INTERSTATE COMMERCE ARE COGNIZABLE UNDER THE ACT, IS TANTAMOUNT TO THE PROPOSITION THAT THE COMMISSION HAS JURISDICTION OVER INTRASTATE ACTS AFFECTING INTERSTATE COMMERCE. BOTH CONGRESS AND THE COURTS HAVE RECOGNIZED THAT THE WORDS "IN COMMERCE" DO NOT CONFER JURISDICTION OVER ACTS "AFFECTING" COMMERCE.

Confronted by the unanswerable decisions of this and other courts drawing a clear line of demarcation between the words "in commerce" and the words "affecting commerce", Petitioner, in an effort to escape the effect of these adjudications, enters into a dissertation, as has been said, on the two-sided nature of competition, attempting, in this connection, to divert attention from the coherent unity of the entire statute by concentrating its argument on the language "competition in commerce". Intrastate sales methods which may *compete* with interstate commerce are methods, of course, which may *affect* interstate commerce. The discussion of the nature of competition and the attempted dissection of the Act do not obscure the question genuinely presented upon this phase of the controversy, *i. e.*, is the language "unfair methods of competition *in* [*interstate*] *commerce*" synonymous with the expression

"unfair methods of competition *affecting* [interstate] commerce"?

In the course of the congressional deliberations preceding the enactment of the Wheeler-Lea Amendment, (74th Congress, 1st Session,) Senate Bill No. 944 provided for an amendment of Section 5 of the Trade Commission Act to read as follows:

> "Unfair methods in *or affecting* commerce and unfair or deceptive acts in *or affecting* commerce, are declared unlawful.
>
> "The Commission is empowered and directed to prevent persons * * * from using unfair methods in or affecting commerce and unfair or deceptive acts in *or affecting* commerce." (Italics supplied.)

This bill having been reported back from the Senate Committee on Interstate Commerce, with recommendation for adoption, became the subject of an extended debate in the Senate.[7] Upon a motion to reconsider the approval of the bill because the full import of the amendment had not been realized, Senator Wheeler stated:

> "The only modification of the paragraph to which the senator calls attention is the insertion of the words, 'or affecting' ".

Senator Austin replied:

> "Yes, Mr. President; but apparently that is what is the trouble with the bill. Congress has gone as far as it had any right to go when it undertook to regulate and to deal with unfair trade practices in commerce * * *".

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[7] 74th Congress, 1st Session, Senate Debates. Congressional Record, Vol. 79, Part II, pages 1842 *et seq.*

Senator King remarked:

"As I understand the senator's position is that the language of this provision is too broad and that it would give to the Commission the right to go into a state and investigate intrastate commerce exclusively where it clearly and obviously was intrastate instead of interstate commerce."

Senator Austin said:

"I do take that position. * * *"

Senator Borah stated:

"I do not think we can authorize the Trade Commission to deal with intrastate affairs. I think if we should undertake to do so, our action would be held invalid. * * *"

The original adoption of the amendment having been reconsidered, the bill went over and was not brought up again before the end of the First Session of Congress. A new bill (Senate Bill 3744) which significantly omitted the words "or affecting" was introduced in the Second Session of the 74th Congress and was subsequently enacted into law.[8]

Another indisputable recognition by Congress of the distinction between the scope of statutory language reading "in commerce" and language covering situations "affecting commerce", is found in the legislative history of the Second Federal Employers' Liability Act. The statute, as enacted in 1908, provided:

"Every common carrier by railroad while engaged in commerce between any of the several States or ter-

[8] 74th Congress, 2nd Session, Senate Debates. Congressional Record, Vol. 80, pages 6588 *et seq.*, 6603, 6702.

ritories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * *."

In construing this Act, the phrase "employed in interstate commerce" was held by the courts to mean that the injured employee, at the time of the injury, must be actually engaged in interstate transportation, or in work so closely related to it as to be practically part of it. Employment in occupations which ultimately affect the interstate movement of goods was held not to come within the terms of the Act.

Shanks v. *Delaware L. & W. R. Co.*, 239 U. S. 556, 558.

Ill. Central Ry. Co. v. *Behrens*, 233 U. S. 473, 478.

Chicago & Eastern Ill. Ry. Co. v. *Industrial Commission*, 284 U. S. 296, 299.

Schneider v. *Lehigh Valley R. Co.* (C. C. A. 2), 112 Fed. (2) 712, 713.

For the express purpose of broadening the scope of the Act so as to include employees engaged in interstate operations affecting interstate commerce, Congress, in 1939, amended the Act by adding the following clause:

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; *or shall, in any way directly or closely and substantially, affect such commerce* as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases' (approved April 22, 1908), as the same has

been or may hereafter be amended." (53 Stat. 1404; 45 U. S. C. Sec. 51.) (Italics supplied.)

Still further congressional recognition of the important distinction between the phrase "in commerce" and "affecting commerce" is expressed in the National Labor Relations Act.[9] For judicial recognition of the particularly broad jurisdiction conferred upon the National Labor Relations Board by the language "affecting commerce", see:

Apex Hosiery Co. v. *Leader,* 310 U. S. 469.

National Labor Relations Board v. *Jones & Laughlin Steel Corporation,* 301 U. S. 1, 31.

Leader v. *Apex Hosiery Co.,* (C. C. A. 3rd) 108 Fed. (2d) 71, 81 (affirmed in *Apex Hosiery Co* v. *Leader, supra*).

Blankenship v. *Kurfman,* (C. C. A. 7th), 96 Fed. (2d) 450, 456.

Other federal legislation expressly providing for jurisdiction over intrastate situations affecting interstate commerce is contained in the Bituminous Coal Conservation Act[10] (see *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 387, 393) and the Agricultural Adjustment Act[11] (see *Mulford* v. *Smith,* 307 U. S. 38).

In clear contradistinction to the foregoing statutes governing activities both "in" and "affecting" interstate commerce, Congress in other enactments deliberately confined the scope of the legislation to persons "engaged *in* interstate commerce" or to transactions "*in* interstate

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[9] 49 Stat. 450, 453; 29 U.S.C. Secs. 152 (6, 7), 160(a), fully set forth in Appendix D.

[10] 50 Stat. 85; 15 U.S.C. Sec. 834, fully set forth in Appendix D.

[11] 52 Stat. 38; 7 U.S.C. Sec. 1301 (a-4), fully set forth in Appendix D.

commerce." The Fair Labor Standards Act[12] applies to any employee "who is engaged in commerce or in the production of goods for commerce". The Act has been held not to include occupations affecting interstate commerce. *United States* v. *F. W. Darby Lumber Co.*, (D.C., S.D., Ga.) 31 F. Supp. 734, 737.

The Clayton Act prohibits price discriminations by "any person engaged in commerce, in the course of such commerce".[13] It has consistently been held that in order to come within the ambit of this statute the person charged with violation thereof must have committed a discriminatory act in the course of interstate commerce. Allegations in proceedings under the Clayton Act to the effect that the activities complained of affect interstate commerce are not sufficient. See:

Lipson v. *Socony Vacuum Corp.* (C.C.A. 1), 87 Fed. (2d) 265.

Lipson v. *Socony-Vacuum Corp.* (C.C.A. 1), 76 Fed. (2d) 213, 216, 217.

Port & Co. v. *Girdler*, (N. Y. Supreme Court, November, 1939), CCH Trade Regulations No. 25,347.

In *Schechter* v. *United States*, 295 U. S. 495, 542, 544, this court unmistakably announced that the statutory language "in commerce" has a connotation different from the words "affecting commerce." In that portion of the opinion which has been in no way modified by any later decisions of this court, it was clearly recognized that the statutory phrase "in commerce" restricts the scope of the statute to activities or situations in the current or flow of

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[12] 52 Stat. 1060, 29 U.S.C. Sections 205, 207, fully set forth in Appendix D. See 75th Congress, 3rd Session, House Report 2182; 83 Congressional Record Page 9168.

[13] 38 Stat. 730; 15 U.S.C. Section 13, fully set forth in Appendix D.

interstate commerce while the term "affecting interstate commerce" confers powers also over intrastate activities or situations which have a direct and substantial relation to interstate commerce.

Other judicial statements to the same effect are found in *California Rice Industry* v. *Federal Trade Commission* (C.C.A. 9), 102 Fed. (2d) 716, 723; *Leader* v. *Apex Hosiery Co.* (C.C.A. 3), 108 Fed. (2d) 71, 81; *Blankenship* v. *Kurfman* (C.C.A. 7), 96 Fed. (2d) 450.

Petitioner contends that several decisions of lower federal courts have recognized that the Trade Commission is authorized to proceed against a concern which is not itself engaged in interstate commerce (Pet. Br. p. 13). The cases cited in support of this contention, however, demonstrate the contrary.

In *National Harness Mfrs.' Association* v. *Federal Trade Commission,* 268 Fed. 705, there existed a nationwide conspiracy between the members of the Association in violation of the Sherman Anti-Trust Act. The respondent, *Wholesale Saddlery Association,* consisted of persons and concerns engaged in selling harness and saddlery in interstate commerce throughout the various states and territories of the United States. The respondent, *National Harness Mfrs.' Association,* was composed of concerns who purchased their supplies of harness and saddlery from wholesalers and jobbers in interstate commerce, including members of the Saddlery Association. It was found that the officers and members of both associations co-operated by means of combinations and agreements extending throughout the various states to impose certain restrictions upon interstate business in harness and saddlery goods (p. 710).

Since it was expressly found that the members of the respondent associations were *actually engaged* in

interstate commerce, the ensuing statement of the court that interstate commerce was directly *affected* by the alleged unfair methods of competition was obviously unnecessary to the decision of the case. Moreover, when the portion of the opinion quoted by Petitioner is considered in its context, it appears that this language of the court was merely in reply to the contention that the challenged activities of the respondent association did not constitute *commercial* activities. In support of this statement the court referred to the cases of *Loewe* v. *Lawlor,* 208 U. S. 274, *Eastern States Lumber Co.* v. *United States,* 234 U. S. 600, and *Nash* v. *United States,* 229 U. S. 373, where it was held that persons conspiring with the intention of restraining interstate commerce are guilty of violating the Sherman Anti-Trust Act without being themselves engaged in a commercial occupation.

The second case cited by Petitioner in this connection, *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission* (C.C.A. 8), 13 Fed. (2d) 673, involved a proceeding by the Commission charging that the members of the Chamber were engaged in a conspiracy among themselves and with others to boycott and refuse to deal with the members and customers of the St. Paul Grain Exchange and of the Equity Co-operative Exchange. Against the contention of respondents in that case that the Chamber was not engaged in interstate commerce, the court held that that body was "*an instrumentality in the current of interstate commerce*" and, consequently, that its members were engaged in the operation of an instrumentality of interstate commerce. In so holding, the court cited and relied upon previous adjudications by this court to the effect that stock or commodity exchanges, stockyards, etc., constitute channels of the current of interstate commerce. Hence, the practices complained of in the *Chamber of Commerce* case occurred directly in the stream of inter-

state commerce which was handled and controlled *by the respondents themselves.*

Moreover, in the *Chamber of Commerce* case, the court found that the officers and members of the respondent organization were engaged in a conspiracy to restrain interstate commerce, thus directly contravening the prohibitions of the Sherman Act. The proceeding of the Commission thus being founded upon a violation of the Sherman Act, the court employed language which had been developed in a series of decisions applying the Sherman Act to certain intrastate activities. It is familiar doctrine that in circumscribing the scope of the Sherman Act with relation to intrastate activities, the courts have developed the criterion that the indicted intrastate activities must directly affect interstate commerce. Having held that the respondent organization and the members thereof were engaged in the operation of an agency of interstate commerce, which alone was sufficient to establish jurisdiction of the Commission, the subsequent language of the court quoted by Petitioner, finds its explanation in the existence of a conspiracy *affecting* interstate commerce.

In further support of its contention that the Trade Commission Act should be construed to embrace intrastate sales methods *affecting* interstate commerce, Petitioner relies on the case of *Houston, East & West Texas Ry Co.* v. *United States,* 234 U. S. 342, (Pet. Br. p. 16) wherein this court was called upon to construe the Interstate Commerce Act.

The Interstate Commerce Act (41 Stat. 474; 49 U. S. C. Sec. 1) applies generally "to common carriers engaged in—(a) the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are carried under a common control, management, or arrangement for a continuous carriage or shipment; * * * " (Sec. 1 (1a), 49 U. S. C. Par. 1 (1a)).

Viewing common carriers as essential agencies for the movement of interstate commerce, Congress thus subjected all common carriers to the jurisdiction of the Interstate Commerce Commission.

Section 2 provides for the application of the Interstate Commerce Act to the transportation of passengers and property and transmission of intelligence. In a proviso to this section an exception is made with respect "to the transportation of passengers or property, or to the receiving, delivery, storage or handling of property, wholly within one state and not shipped to or from any foreign country from or to any place in the United States as aforesaid; * * *." The effect of this proviso is to exempt transportation which is established to be wholly within one state from the scope of the Act which, *a priori*, vests the Interstate Commerce Commission with jurisdiction over all transportation of passengers and property.

Thus, in the broad language of the Interstate Commerce Act is found express legislative sanction for the establishment and regulation of intrastate rates, unless such rates concern charges for transportation wholly intrastate, having no contact or connection with, or influence upon, the dominant interstate character of the common carrier.

In the case above cited (frequently referred to as the *Shreveport Rate Case*), the Interstate Commerce Commission, in a proceeding against the Houston, East & West Texas Railway Company and the Houston and Shreveport Railroad Company, found that the carriers maintained unreasonable rates in their interstate transportation from Shreveport, Louisiana, to various points in Texas. The Commerce Commission consequently established the maximum class rates for this interstate traffic. These interstate rates from Shreveport to certain points in Texas were higher than rates charged by the carriers for transportation between certain cities in Texas under substanti-

ally similar conditions and circumstances. The Interstate Commerce Commission found:

> "That thereby 'an unlawful and undue preference and advantage' was given to the Texas cities, and a 'discrimination' that was 'undue and unlawful' was effected against Shreveport."

The order of the Commission, therefore, first fixed and established the maximum class rates to apply to the interstate transportation of traffic from Shreveport, Louisiana, to named points in Texas. In connection with, and incidental to, this regulation of the interstate rates of the carriers, the order of the Commission directed the carriers:

> "to desist from charging higher rates for the transportation of any commodity from Shreveport to Dallas and Houston, respectively, and intermediate points than were contemporaneously charged by the carriage of such commodity from Dallas and Houston toward Shreveport for equal distances, as the Commission found that relation of rates to be reasonable."

It is to be noted that the interstate as well as the intrastate traffic regulated by this order of the Commission was carried on with the same trains serving interstate as well as intrastate transportation, on the same tracks leading from points outside of Texas to cities in Texas and serving also as connections between those cities within the State of Texas which were mentioned in the order.

This background of the order in question is illuminated by the following passages from the opinion of the court:

> "While these decisions sustaining the Federal power relate to measures adopted in the interest of the safety of persons and property, they illustrate the principle that Congress, in the exercise of its

paramount power, may prevent the *common instrumentalities of interstate and intrastate commercial intercourse* from being used in their intrastate operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a state, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled.

"This principle is applicable here. We find no reason to doubt that Congress is entitled to keep the highways of interstate communication open to interstate traffic upon fair and equal terms. That an unjust discrimination in the rates of a common carrier, by which one person or locality is unduly favored as against another under substantially similar conditions of traffic, constitutes an evil, is undeniable; and where this evil consists in the *action of an interstate carrier* in unreasonably discriminating against interstate traffic over its line, the authority of Congress to prevent it is equally clear. It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. *The use of the instrument of interstate commerce* in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention." (pp. 353, 354) (Italics supplied.)

Having decided that the regulation of these intrastate rates was a necessary part of the regulation of the interstate rates and that such regulation came within the power which Congress had constitutionally vested in the Interstate Commerce Commission by Section 3 of the

Act (24 Stat. 380), the court proceeded to consider the effect of the proviso to Section 2, providing that the Act shall not apply to the transportation of passengers or property wholly within one state. The Commerce Court had held:

> "That this proviso is a mere disclaimer of any intention on the part of Congress, in enacting the Act to regulate commerce, to exceed its constitutional power and that it was not designed to limit or confine the power which Congress could exercise—and, in our opinion, has exercised—in respect of such matters as are here in dispute. If this construction be correct it follows that the proviso in no way prevents the application of the third section to the facts of this case, and, therefore, it was within the authority of the Commission to make the order in question." (205 Fed. 380, 384.)

This Court, in affirming the decision of the Commerce Court, held that the carriers, being instrumentalities of interstate commerce, were subject to the jurisdiction of the Commission and that their intrastate rates in question, giving undue preference to certain localities, came within the language of the third section of the Act. It said:

> "This language is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn. There is no exception or qualification with respect to an unreasonable discrimination against interstate traffic produced by the relation of intrastate to interstate rates as maintained by the carrier." (p. 356)

Since the proviso to the first section of the Act constitutes an exception to the power generally conferred upon the Commission by the third Section of the Act, the court gave

to it a strict construction as not derogating from the general powers of the Commission unless it should be shown to be applicable in letter as well as spirit.

> "These words of the proviso have appropriate reference to exclusively intrastate traffic, separately considered; to the regulation of domestic commerce, as such. The powers conferred by the act are not thereby limited where interstate commerce itself is involved. This is plainly the case when the Commission finds that unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by a carrier subject to the act." (p. 358)

In view of this reasoning of the court, the assertion of Petitioner that the considerations and the rule laid down in the *Shreveport* case apply, *a fortiori,* to the instant case (Pet. Br. p. 17) is, therefore, wholly unwarranted. Contrary to the Interstate Commerce Act, the Federal Trade Commission Act confers but a limited jurisdiction upon the Trade Commission. In construing the Trade Commission Act the court is required to consider not the effect of an exception to a general power vested in the Commission, but the meaning of that part of the statute which constitutes its grant of authority.

A railroad operating interstate occupies a significant and important position in the national economy. It is obliged to serve, at prescribed rates, anyone lawfully requesting its facilities. The basic structure of such institutions, both physically and financially, is determined by the interstate character of its business. Its rails or lines run continuously across state borders. Its stations house under one roof all of the employees and paraphernalia necessary to handle both interstate and intrastate transportation. The same freight depots receive, load and unload goods moving interstate and goods moving in in-

rastate journeys. Its round houses and switching equipment are similarly used and its rolling stock moves across tate lines with through passengers and freight and with assengers and freight of local destination. Its bonds nd debentures are sold upon the basis of its total earnngs. When, therefore, the Interstate Commerce Commision comes to determine railroad rates, it must consider he carrier as a whole, its cost of operation, its earnings nd its obligations. Considerations of the same import pply, essentially, to steamship lines, telegraph and telephone companies and other media of transportation and ransmission.

In F. D. G. Ribble, State and National Power Over Commerce (Columbia Legal Studies III, 1937), p. 161, the author comments on the *Shreveport Rate* case as follows:

> "The carriers involved were engaged in interstate commerce. Accordingly the decision only sustained the power of the Interstate Commerce Commission in dealing with interstate carriers. The Court rested heavily on this fact, saying, for example: 'Congress in the exercise of its paramount power may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce.' And again it declared: 'We find no reason to doubt that Congress is entitled to keep the highways of interstate communication open to interstate traffic upon fair and equal terms.' In relying on the decisions with reference to the Hours of Service Act and the Safety Appliance Act, the Court repeated its conviction as to the essential unity and inseparability of the interstate and intrastate transactions *of an interstate carrier.*" (Italics supplied.)

Because of the fact that the court, in the *Shreveport Rate* case, was concerned with interstate carriers which

used their common instrumentalities of interstate and intrastate transportation to discriminate in their rates for transportation over the same lines serving both interstate and intrastate commerce, against interstate business, and because of the different language of the Interstate Commerce Act, the *Shreveport Rate* case, therefore, cannot be relied upon to include within the scope of the Federal Trade Commission Act local sales methods which possess only an intrastate aspect.

Petitioner finally urges upon the court the case of *American Can Co.* v. *Ladoga Canning Co.* (C.C.A. 7), 44 Fed. (2d) 763, as an example of judicial construction of the Clayton Act which, at that time, prohibited price discriminations by any person engaged in interstate commerce, in the course of such commerce (Pet. Br. p. 18). Petitioner says that in that case the court construed the phrase "in the course of such commerce" as referring likewise to the commerce of the party receiving the benefit of the discriminatory price.

An analysis of the case shows that the court was concerned merely with the extent of the stream of commerce doctrine as applied to the commerce of the party which engaged in discriminatory practices. It appeared in that case that the defendant company discriminated in its sales to purchasers inside the state as well as outside the state. The greater part of its product was sold to the Van Camp Company which maintained a factory in the same state in which defendant's plant was located. The Van Camp Company used the cans purchased from the defendant for packaging food and in turn sold its product packed in said cans in interstate commerce, throughout the United States. The sales by the defendant which were alleged to be discriminatory thus initiated the interstate journey of defendant's product which was only temporarily interrupted by the process of filling the cans in Van-Camp's plant and

from there continued its interstate movement. The court's conception of the sale of the cans by the defendant as a part of an intended and continuous current of interstate commerce is expressed beyond doubt in the following part of its opinion:

> "The tin cans were useless save as they might be used as containers for food stuffs. Both parties knew they were to be so used. They were sold with the understanding that the purchaser would use them to distribute goods in interstate commerce." (P. 771.)

Moreover, in deciding that these sales by defendant were "in the course of interstate commerce", the court followed explicitly the stream of commerce doctrine laid down in *Stafford* v. *Wallace,* 258 U. S. 459, and *Swift* v. *United States,* 196 U. S. 375, and treated the packing industry of Van Camp as a channel or throat of commerce analogous to the stock yards. The *American Can* case, therefore, affords no basis for Petitioner's contention that defendant's intrastate sales were held to constitute sales in the course of interstate commerce because of their effect upon such commerce.

The foregoing discussion establishes that the Trade Commission Act cannot be applied in disregard of the recognized distinction between acts *in* and acts *affecting* interstate commerce. Since the statute under consideration confines the powers of the Commission to the prevention of the use of unfair methods of competition *in* interstate commerce, it confers no authority to regulate sales methods in an intrastate business which, at the most, can be said to *affect* interstate commerce. The authorities cited by Petitioner are wholly insufficient to sustain its position.

V.

EVEN IF THE WORDS "AFFECTING COMMERCE" COULD, BY JUDICIAL INTERPRETATION, BE READ INTO THE FEDERAL TRADE COMMISSION ACT, FEDERAL JURISDICTION DERIVED FROM THE COMMERCE CLAUSE EXTENDS TO SUCH INTRASTATE TRANSACTIONS ONLY AS DIRECTLY AFFECT INTERSTATE COMMERCE.

As Petitioner admits, the sales methods of Respondent do not come in conflict with competitors in a contest for business in which Respondent's activities pass beyond the boundaries of Illinois. Respondent's efforts to sell, innocent under Illinois law, are said to come within federal regulatory power only because they affect producers outside of the state who desire to compete for trade in the Illinois market.

Even if the authorities discussed under the preceding point to the effect that the language "in commerce" is not the equivalent of the broader term "affecting commerce" could be disregarded, Petitioner is found to be confronted by another doctrine of federal jurisprudence, the recognition of which must result in the disapproval of the cease and desist order under consideration in the instant case.

In determining how far federal jurisdiction derived from the Commerce Clause may go in controlling intrastate transactions upon the ground that they "affect" interstate commerce, it is to be observed that there is a necessary and well established distinction between direct and indirect effects. *Schechter* v. *United States,* 295 U. S. 495, 546-548. The reduction of the movement of goods in interstate commerce, if but an incidental result of activities confined wholly within the boundaries of a single state, is not sufficient to bring such intrastate activities within the reach of federal control. *Moore* v. *New York Cotton Exchange,*

270 U. S. 593, 604. *Industrial Association of San Francisco* v. *United States*, 268 U. S. 64, 80. *Levering & Garringues Co.* v. *Morrin*, 289 U. S. 103, 107. *United Leather Workers* v. *Herkert*, 265 U. S. 457, 470. *Ware & Leland* v. *Mobile County*, 209 U. S. 404, 413. *Anderson* v. *United States*, 171 U. S. 604, 615, 616. *National Labor Relations Board* v. *Idaho-Maryland Mines Corp.* (C. C. A. 9), 98 Fed. (2d) 129, 131. *United States* v. *So. Cal. Wholesale Grocers Ass'n.*, (D. C. Cal.) 7 Fed. (2d) 944, 947. *Abouaf* v. *Spreckels Co.* (D. C., Cal.), 26 Fed. Sup. 830, 833. *Arthur* v. *Kraft-Phoenix Cheese Corp.* (D. C. Maryland), 26 Fed. Sup. 824, 825.

It is submitted that in no case has federal jurisdiction yet been upheld over transactions occurring within the confines of one state on the ground that they affected interstate commerce unless they fell within one or more of the following classes:

1. Where there existed an interference with, or an obstruction of, the operation of an instrumentality of interstate commerce.
2. Where there existed a combination or other concerted action with the intent to interfere with a business engaged in interstate commerce.
3. Where those charged with obstruction actually controlled the channels, or some essential part thereof, through which the stream of subjects of interstate commerce moves, thus possessing the power physically to arrest the progress of interstate commerce.
4. Where the local transactions sought to be controlled were so closely and inseparably commingled with the transactions in interstate commerce of the same person as to make regulation of the interstate transactions impossible without concurrently regulating the local transactions.

The case at bar obviously does not fall within any of the above classes of cases in which a direct relation between intrastate transactions and interstate commerce has been found to exist. The asserted reduction of the quantum of the interstate trade of Respondent's foreign competitors, is merely an incidental result of the preference of Illinois buyers for goods of the Respondent over the goods of such competitors. *Industrial Association of San Francisco* v. *United States,* 268 U. S. 64, 80. *Moore* v. *New York Cotton Exchange,* 270 U. S. 593, 604. *United States* v. *So. Cal. Wholesale Grocers Ass'n.* (D. C., Cal.), 7 Fed. (2d) 944, 947.

Even in the thinking of the most ardent federalists, the sphere of federal influence is not unlimited. As this court said in *Schechter* v. *United States,* 295 U. S. 495, 546:

> "If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government."

VI.

THE INSUFFICIENCY OF THE COMMISSION'S FINDINGS OF FACT UPON WHICH THE COMMISSION'S RULING WAS PREDICATED, ALONE REQUIRES THE DISAPPROVAL AND REVERSAL OF THE CEASE AND DESIST ORDER.

When Petitioner asserts that "the court below did not question the validity of any of the Commission's findings of fact" (Pet. Br. p. 5), it states but a misleading half-truth. The Circuit Court of Appeals did not question the findings, not because it accepted them as true, but because

it believed that the appeal presented essentially a question of law as to the scope of the power of the Commission over intrastate sales methods.

An examination of the Commission's findings discloses that they are devoid of concrete instances showing that Respondent's sales methods under attack actually caused buyers to prefer Respondent's merchandise over, and to refrain from purchasing the goods of, interstate vendors. There are no findings demonstrating that the asserted decline in the business of certain out-of-state manufacturers was caused by Respondent's intrastate transactions. Instead, the findings of fact consist of vague and general statements which partake of the nature of pleadings rather than findings of fact (Rec. 11, 13).

Such unsatisfactory findings of the Federal Trade Commission have been sharply criticized and have led to the reversal of the Commission's cease and desist orders. See, *John Bene & Sons* v. *Federal Trade Commission* (C. C. A. 2d), 299 Fed. 468, 470, 471. *B. S. Pearsall Butter Co.* v. *Federal Trade Commission* (C. C. A. 7th), 292 Fed. 720, 722, 723. *Federal Trade Commission* v. *Curtis Publ. Co.*, 260 U. S. 568, 577, 580. *New Jersey Asbestos Co.* v. *Federal Trade Commission* (C. C. A. 2d), 264 Fed. 509, 510. *L. B. Silver Co.* v. *Federal Trade Commission,* (C. C. A. 6th) 289 Fed. 985, 990. *Curtis Pub. Co.* v. *Federal Trade Commission,* (C. C. A. 3rd) 270 Fed. 881, 885. Gerard C. Henderson, The Federal Trade Commission (1924), pp. 108, 116, 128, 328.

Petitioner predicates its contention that the order entered by the Commission was valid on the ground that Respondent's transactions in Illinois were in competition with the interstate commerce of Respondent's rivals. In the findings of the Commission, however, there is a complete absence of any facts establishing that the goods of the outside competitors were in interstate commerce at the

time of their contact with Respondent's sales methods. It is well established that the interstate character of a business ends when the goods have come to rest within the state and that thereafter they are treated like any merchandise which is handled within the state. See, *Atlantic Coast Line R. Co.* v. *Standard Oil Co. of Kentucky*, 275 U. S. 257, 267. *Ward Baking Co.* v. *Federal Trade Commission* (C. C. A. 2), 264 Fed. 330. *Winslow* v. *Federal Trade Commission* (C. C. A. 4), 277 Fed. 206. *Lipson* v. *Socony-Vacuum Corp.* (C. C. A. 1), 87 Fed. (2d) 265, 266. *Corey* v. *Independent Ice Co.* (D. C. Mass), 207 Fed. 459, 463.

Because the findings of the Commission are insufficient both to constitute proper findings of fact and to lay jurisdictional foundation for the order of the Commission, under any theory of the Trade Commission Act, the cease and desist order was properly reversed by the Circuit Court of Appeals.

CONCLUSION.

Under the language of the statute under consideration, taken in its ordinary meaning, it is plain that Congress intended to empower the Trade Commission to prevent interstate activity, *i. e.*, an interstate "use" of unfair methods of competition. Had it been intended to legislate upon action intrastate which affected interstate commerce, language to express such purpose was available as is manifest from other Congressional enactments. Not only the language of the Act but subsequent developments in legislation concerning interstate commerce, clearly discernable at the time of the Wheeler-Lea Amendment, demonstrate this to be true. It seems inevitable, therefore, that this court, using canons of construction which have become law by its

own pronouncements, will not read into the Act the new meaning contended for by Petitioner,—a meaning not expressed and not intended.

It is believed that the Court will instantly perceive that the present appeal to its reviewing powers is, genuinely speaking, an attempt to achieve additional jurisdiction for the Commission through the judicial process rather than by legislative authority. As this Court said in *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 649,

> "Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable, they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions."

It is respectfully submitted that the judgment of the Circuit Court of Appeals reversing the order of the Federal Trade Commission, should be affirmed.

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Attorneys for Respondent.

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Of Counsel.

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APPENDIX A.

REPORTS AND HEARINGS CONCERNING THE WHEELER-LEA AMENDMENT.

SENATE REPORT NO. 221

75TH CONGRESS, 1ST SESSION

March 19, 1937

Mr. Wheeler, from the Committee on Interstate Commerce, submitted the following

REPORT (To Accompany S. 1077)

****

"This bill, as reported by your committee, is identical to S. 3744, which was unanimously passed by the Senate on May 4, 1936. Hearings were held on S. 3744 during the Seventy-fourth Congress and the Committee made several amendments to S. 3744 as a result. All such (*page 1*) amendments and an additional amendment made on the floor of the Senate were adopted by the Senate last year and included in the present S. 1077 which is therefore reported without further amendment.

****

"Section 5 of the present act declares unlawful unfair methods of competition in commerce, and the pending bill amends that section by also declaring unlawful, unfair or deceptive acts and practices in commerce. Under the present act it has been intimated in court decisions that the Commission may lose jurisdiction of a case of deceptive and similar unfair practices if it should develop in the proceeding that all competitors in the industry practiced the same methods, and the Commission may be ousted of

its jurisdiction, no matter how badly the public may be in need of protection from said deceptive and unfair acts. Under the proposed amendment the Commission would have jurisdiction to stop the exploitation or deception (*page 3*) of the public, even though the competitors of the respondent are themselves entitled to no protection because of their engaging in similar practices. It further appears that much time and money must now be expended in order to establish competition and to show injury to competitors, as the courts have held that competition and injury to the same must be established in order for the Commission to retain jurisdiction. Under the proposed amendment, if the Commission should have reason to believe that unfair and deceptive acts and practices are being engaged in, and that it is in the public interest that they be stopped, it could issue its restraining order without being put to the necessity of establishing competition and injury to such competition.

****

"Some objection was voiced in the committee to the use of the word 'acts' and the suggestion was made that the word 'methods' should be substituted for the word 'acts', or that the word 'acts' be eliminated entirely. After consideration the committee is of the opinion that, (*pages 3, 4*) since the powers of the Commission in this respect are injunctive rather than punitive, the Commission should have the power to restrain an unfair act before it had become a method or practice, if, in its discretion, such restraint be in the public interest. A single act may have multiple or continuing effects and may be far reaching.

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"Federal Trade Commission,
Washington, February 11, 1936.

"Hon. Burton K. Wheeler,
Chairman, Committee on Interstate Commerce,
United States Senate, Washington, D. C.

"Dear Mr. Chairman: With further reference to yours of the 4th instant, submitting copy of bill S. 3744, and advising that your committee would appreciate having the views of the Federal Trade Commission on this proposed legislation, I beg to report as follows:

****

"Section 2: This section amends section 5 of the present act, first, by adding the words 'deceptive acts and practices' (p. 3, lines 14, 20, 24-25), so that the first paragraph would read:

> 'That unfair methods of competition and deceptive acts and practices in commerce are hereby declared unlawful.'

"Without these amendatory words, there is a question whether the Commission has jurisdiction of a case of deceptive or other unfair practices where it develops that the offender has no competitor but has a monopoly in his field, or that all competitors in the industry are equally guilty. However much the public interest may be in need of protection in such a case, the Commission may be powerless to give it. In one case involving deceptive advertising in which the Commission had issued its order to cease and desist, the Supreme Court said:

> 'If the necessity of protecting the public against dangerously misleading advertisements of a remedy sold in interstate commerce were all that is necessary to give the Commission jurisdiction, the order could not successfully be assailed.'

"In spite of the finding of the court that the advertising in question was misleading and dangerous to the public, it held that the Commission had no jurisdiction (*page 5*) to order the respondent to cease and desist because it had not been shown that the respondent had competitors who were injured by the deceptive advertisements."

HOUSE OF REPRESENTATIVES REPORT NO. 1613

75TH CONGRESS, 1ST SESSION

August 19, 1937

Mr. Lea, from the Committee on Interstate and Foreign Commerce, submitted the following

REPORT (TO ACCOMPANY S. 1077)

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"GENERAL PURPOSE OF PROPOSED LEGISLATION

"Outside of procedural matters there are two general purposes of this legislation.

"The first is to broaden the powers of the Federal Trade Commission over unfair methods of competition by extending its jurisdiction to cover unfair or deceptive acts or practices in commerce.

"The second general purpose is to provide the Commission with more effective control in the exercise of its jurisdiction over false advertisements of food, drugs, devices, and cosmetics.

****

"By the proposed amendment to section 5, the Commission can prevent such acts or practices which injuriously affect the general public as well as those which are unfair to competitors. In other words, this amendment makes the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor.

"This amendment will also enable the Commission to act more expeditiously and save time and money now required to show actual competition and the injurious effect thereon of the unfair methods in question.

"At the present time, both the investigation of unfair methods of competition and in actual proceedings after the issuance of a formal complaint, the Commission must develop this jurisdictional prerequisite, even though the methods or practices involve representations that are flagrantly false or deceptive and dangerously injurious to the purchasing or consuming public.

"Representatives of the Commission appearing before the committee stated that competition and injury to a competitor can be established in almost every case, but that considerable time and money must be expended in many cases in order to do so. Since it is the (*page 3*) purpose of Congress to protect the consumer as well as the honest competitor, the Commission should be empowered to prevent the use of unfair or deceptive acts or practices in commerce, regardless of whether such acts or practices injuriously affect a competitor."

HOUSE OF REPRESENTATIVES

75TH CONGRESS, 1ST SESSION

HEARING BEFORE THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE ON H. R. 3143

February 18 and 19, 1937

(*page 3*) STATEMENT OF HON. EWIN L. DAVIS, ACCOMPANIED BY MR. GARLAND S. FERGUSON, COMMISSIONER, AND MR. WILLIAM T. KELLEY, CHIEF COUNSEL, FEDERAL TRADE COMMISSION:

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"During the last Congress, the Senate, without objection, passed a bill which embraced all of the proposed changes which are in this bill, also proposed amendments to several other sections of the act, and Senator Wheeler has reintroduced in the Senate, practically the same bill, as passed by the Senate before. However, this bill introduced by Chairman Lea of your committee, as I stated before, relates only to section 5, and there is omitted from this bill several amendments to other sections proposed last year and which were considered by your committee last year. I think it proper to say that those proposed amendments are omitted from this bill with the approval of the members of the Commission, for whatever that may be worth.

"Those were all clarification amendments but as there was such a wide spread misunderstanding of the purpose and effect of some of those amendments, it was (*page 4*) thought by some that they were not of sufficient importance to provoke the controversies which

they did and were relatively unimportant as compared to the proposed amendments to section 5.

****

"Commissioner Davis. Yes. As I said, the first amendment to section 5 of the present act is the addition of the words: 'and unfair or deceptive acts and practices in commerce'.

"Found in lines 10 and 11 of the bill. In order to complete the amendment, the amendatory words 'unfair or deceptive acts and practices in commerce' are also found in line 5, and in lines 8 and 9 of page 2, and the words 'act or practice' are found in lines 3, 9, and 21 of page 3 and in line 12 of page 5.

"Those subsequent references are in order to carry out the idea all through the section.

"Without these mandatory words, there is a question whether the Commission has jurisdiction of a case of deceptive or other unfair practices where it develops that the offender has no competitor but has a monopoly in his field, or that all competitors in the industry are equally guilty, However much the public interest may be in need of protection in such a case, the Commission may be powerless to give it.

*****

(*page 5*) "Mr. Pearson. May I ask, Judge Davis, if I correctly understand this amendment, any practice which of itself would be unfair to a consumer in the absence of any competition would be brought within the jurisdiction of the Federal Trade Commission?

"Commissioner Davis. Yes, sir. In other words, the act itself says that we shall proceed in the public interest and no matter how fraudulent; no matter how vicious; no matter how burdensome or injurious to the public, an

unfair trade practice may be, under the interpretation of the court in the *Raladam Case,* we would be powerless to act and protect the public interest unless we could show that the respondent before us had competitors and had injured them.

(*page 6*) "Mr. Chapman. Judge Davis, do I understand that with this proposed amendment you could go into the question of false, deceptive, or misleading advertisements without showing unfair trade practices?

"Commissioner Davis. No, no; not at all. We say, Congressman Chapman, that there is no distinction between an unfair trade practice or an unfair or deceptive act; but it is the words 'method of competition' that they play upon all of the time—that we must prove that there is competition.

"Mr. Chapman. That is what I wanted to get at.

"Commissioner Davis. That is what they hide behind, and I want to say this in that connection, that rule is not required of any other agency of the Government. It is not required in the Packers' Act which gives the Secretary of Agriculture jurisdiction over unfair practices; and in fact this language here which we propose to insert is about the same as that in the Packers' Act, except it also has the words 'or oppressive.'

******

(*page 7*) "Mr. Kenney, well, would overcharging be an unfair practice under that act?

"Commissioner Davis. An overcharge?

"Mr. Kenney. Yes.

"Commissioner Davis. I do not think that that states sufficient facts upon which an opinion could be rendered.

"Mr. Kenney. Well, if a man makes a 1,000 percent profit on a given article he is selling, would the Commission look into his prices to find out whether he was guilty of unfair practices?

"Commissioner Davis. Well, of course, just on the very meager facts you give, that *probably would not involve interstate commerce.* Of course, we have no jurisdiction over any case in which interstate commerce is not involved. [Italics supplied.]

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(*page 9*) "It is very rare that we have not been able, by diligent effort, to develop some competition, but as I say, it has been at an absolutely, as we conceive it, needless expense in order to prove an obvious fact upon a mere technicality instead of devoting the time of the Commission and of its staff and of the money which you appropriate for us, in investigating and preventing the things that this act is directed against, instead of dealing so largely with a mere technicality."

"Mr. Bulwinkle. But, has the Commission anybody in view that you would like to issue a cease and desist order against?

"Commissioner Davis. None whatever. It is not a personal matter at all. It is not anything of that kind, Congressman. It is a general proposition. And, by the way, this is no new proposition. The Commission has in effect in its annual reports and otherwise been making substantially the same recommendation for years; for years back. It is not anything new or a novel proposition.

HOUSE OF REPRESENTATIVES

74TH CONGRESS, 2ND SESSION

HEARING BEFORE THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE ON S. 3744

May 27, 28 and 29, 1936

STATEMENT OF HON. EWIN L. DAVIS, COMMISSIONER, FEDERAL TRADE COMMISSION—Resumed.

(*page 13*) "Now, this amendment, frankly, we do not think makes any change at all in the actual operation, actual result, except to make unnecessary the most exacting and specific requirements of having to always approve competition and injury to competitors after all of the other elements in the case have been established."

APPENDIX B.

EXCERPTS FROM DECISIONS OF VARIOUS CIRCUIT COURTS OF APPEALS TO THE EFFECT THAT THE FEDERAL TRADE COMMISSION HAS NO JURISDICTION OVER INTRASTATE COMMERCE.

In *California Rice Industry* v. *Federal Trade Commission*, (C.C.A. 9th) 102 Fed. (2d) 716, the Trade Commission attempted to prohibit the fixing of quotas of rice that the respondents might mill or process. The court rejected the asserted jurisdiction of these intrastate practices saying, at page 723:

> "Undoubtedly the fixing of such quotas 'affects' the volume of rice which after milling is sold and delivered into interstate commerce, but unlike the National Labor Relations Act the Federal Trade Commission Act does not create a control in the Commission of practices both 'affecting' interstate commerce and 'in' interstate commerce. Since the Commission's authority is confined to transactions, 'in' interstate commerce, paragraph '5' of its order to cease and desist from 'fixing or determining the quotas or percentages of the rice crop that the Miller respondents may mill or process * * *' is beyond its jurisdiction and void."

In *Ward Baking Co.* v. *Federal Trade Commission* (C.C. A. 2d), 264 Fed. 330, there was an attempted exercise of jurisdiction over the practice of giving premiums in the sale of bread within the state of Rhode Island. Overruling the order of the Commission, the court said, at page 331:

> "Doubtless bread sold in Massachusetts to be delivered to the purchaser in Rhode Island would be inter-

state commerce, but that is not this case. Moreover, the Commission is not finding the act of transportation from Massachusetts to Rhode Island unfair, but *the method of local sales* made in Rhode Island. If the respondent had its own stores in Rhode Island, and carried to them from Massachusetts bread to be there sold, *this method of selling could not be considered interstate commerce.*" (Italics supplied.)

In *Winslow* v. *Federal Trade Commission* (C. C. A. 4th) 277 Fed. 206, the court considered certain unfair practices in the state of Virginia, which, according to the findings of the Commission, affected the interstate and foreign business of the respondents' competitors. The court held at page 209:

"In carrying on the business thus outlined, were the petitioners engaged in interstate or foreign commerce? This is the fundamental question to be determined, since if they were not, the commission was without jurisdiction. The claim that they were engaged in interstate commerce rests wholly on the fact that the commodities in which they deal are in large part transported into Virginia from other states in which they are procured. But this transportation ends when the goods reach their destination and are placed in petitioners' warehouses in Norfolk and Newport News. They are then incorporated in the general stock of merchandise there held for sale, and become subject, so far as now concerns us, to the exclusive jurisdiction of the state of Virginia. Their subsequent sale and delivery within that state, with which alone the condemned practices are connected, is in no sense interstate commerce. In short, it is quite beyond doubt that the jurisdiction of the commission over the matter in hand cannot be supported by the prior, but independent and completed transportation of the goods,

or some part of them, from another state. *Brown* v. *Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257; *Robbins* v. *Taxing District*, 120 U. S. 489, 497, 7 Sup. Ct. 592, 30 L. Ed. 694; *Wagner* v. *Covington*, 251 U. S. 95, 40 Sup. Ct. 93, 64 L. Ed. 157; *American Harrow Co.* v. *Shaffer* (C. C.) 68 Fed. 750; *Ward Baking Co.* v. *Federal Trade Commission* (C. C. A.) 264 Fed. 330, directly in point; *Roselle* v. *Commonwealth*, 110 Va. 235, 65 S. E. 526."

In *Utah-Idaho Sugar Co.* v. *F. T. C.* (C. C. A. 8th), 22 Fed. (2d) 122, the court said, at page 125:

"The acts to which the proof is directed, consisted in the effort of respondents to prevent competing factories being located in contiguous territory where they might absorb a part of the supply of beets to respondents' factories. It was at most a prevention of competition in the purchase of the raw material for manufacture within the state, and, in no case does the proof show an interference with the transport of beets from one state to another, or an interference with the purchase thereof."

In *Canfield Oil Co.* v. *Federal Trade Commission* (C.C.A. 6th), 274 Fed. 571, the Trade Commission attempted to exercise jurisdiction over respondent's method of leasing tanks and pumps to distributors of gasoline, by which method respondent secured an unfair advantage over competitors engaged in interstate commerce. The court rejected the contention of the Commission stating, at page 574:

"It would therefore appear that this order of the Federal Trade Commission to cease and desist is based upon the theory that the petitioners in the marketing of gasoline and other oil products are engaged in interstate commerce. In view of the uncontradicted evidence and the stipulations and agreements of the par-

ties hereinbefore referred to, this theory is not tenable. On the contrary, this evidence and the agreements of the parties in reference to the facts affirmatively show that the sales business of the petitioners is purely and wholly intrastate. *Bowman, Atty. Gen.* v. *Continental Oil Co.*, 256 U. S. 642, 41 Sup. Ct. 606, 65 L. Ed. 1139, decided by the United States Supreme Court June 6, 1921.

"It is insisted, however, by counsel for the commission that there are a number of corporations, competitors of the petitioners, doing business within the state of Ohio, who are engaged in interstate commerce, and that therefore the Federal Trade Commission has jurisdiction to make these findings and order under the doctrine announced by the United States Supreme Court in the Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L.R.A. (N.S.) 1151, Ann. Cas. 1916A, 18, and *Railroad Co.* v. *U. S.*, 234 U. S. 342, 34 Sup. Ct. 833, 58 L. Ed. 1341, which latter case is commonly known as the Shreveport Rate Case.

"To this proposition there are two answers: (1) The findings and orders of the commission purport to regulate the business of the petitioners as interstate commerce, and not because the methods employed by petitioners in the conduct of intrastate business are discriminatory against, or a burden upon interstate commerce. (2) The evidence in these cases and the findings of fact made by the commission do not bring them within the purview of the cases above cited.

* * *

"The findings made by the commission in these cases do not show such an extraordinary condition of affairs, or any such direct burden, hindrance, or discrimination against interstate traffic, as would call for the exercise of federal control over purely intrastate business."

APPENDIX C.

REFERENCES TO THE LEGISLATIVE HISTORY OF THE FEDERAL TRADE COMMISSION ACT.

63rd Congress, Second Session. House of Representatives. Committee on Interstate and Foreign Commerce, Report No. 533. Report of Rep. Covington, to accompany H.R. 15613, part 1, page 2. Report of Rep. Lafferty, part 3, pages 1, 4. (House Reports, Vol. 2, 1913-1914.)

63rd Congress, Second Session. Senate Report 597. Senate Committee on Interstate Commerce. Report of Sen. Newlands, to accompany H.R. 15,613, pages 8, 13. Report of Sen. Cummins, page 32. Remarks of Sen. Newlands, page 38.

63rd Congress, Second Session. House of Representatives. Report No. 1142. Conference Report to accompany H.R. 15613 from the managers on the part of the House, pages 18, 19 (House Reports, Vol. 3, 1913-1914).

63rd Congress, Second Session. House of Representatives, debates on conference report submitted by managers of the House. 51st Congressional Record, part 15, pages 14919 *et seq.*, 14924-14943.

63rd Congress, Second Session. Senate Debates. Conference report submitted to Senate, 51st Congressional Record, part 15, pages 14764-14772-14782-14802.

W. H. S. Stevens, The Trade Commission Act. 4 American Economic Review, pp. 840 *et seq.* (1914).

James A. Fayne, The Federal Trade Commission: The Development of the Law Which Led to its Establishment. 9 American Political Science Review, pp. 57 *et seq.* (1915).

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APPENDIX D.

STATUTES REGULATING INTRASTATE SITUATIONS AFFECTING INTERSTATE COMMERCE.

NATIONAL LABOR RELATIONS ACT.

"*Powers of Board Generally.* The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise." (49 Stat. 453; 29 U.S.C. Sec. 160(a).)

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." (49 Stat. 450; 29 U.S.C. Sec. 152 (6, 7).)

SECOND EMPLOYERS' LIABILITY ACT, AS AMENDED 1939.

"Every common carrier by railroad while engaging in commerce between any of the several States or

Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases' (approved April 22, 1908), as the same has been or may hereafter be amended." (53 Stat. 1404; 45 U.S.C. Sec. 51.)

BITUMINOUS COAL CONSERVATION ACT.

"Whenever the Commission upon investigation instituted upon its own motion or upon petition of any code member, district board, State or political subdi-

vision thereof, or the consumers' counsel, after hearing finds that transactions in coal in intrastate commerce by any person or in any locality cause any undue or unreasonable advantage, preference, or prejudice as between persons and localities in such commerce on the one hand and interstate commerce in coal on the other hand, or any undue, unreasonable, or unjust discrimination against interstate commerce in coal, or in any manner directly affect interstate commerce in coal, the Commission shall by order so declare and thereafter coal sold, delivered or offered for sale in such intrastate commerce shall be subject to the provisions of sections 831, 832 and 833." (50 Stat. 85; 15 U.S.C. Sec. 834.)

AGRICULTURAL ADJUSTMENT ACT.

"(4) The term 'affect interstate and foreign commerce' means, among other things, in such commerce, or to burden or obstruct such commerce or the free and orderly flow thereof; or to create or tend to create a surplus of any agricultural commodity which burdens or obstructs such commerce or the free and orderly flow thereof." (52 Stat. 38, 202; 7 U.S.C. Sec. 1301(a4).)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 85

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

BUNTE BROTHERS, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SUPPLEMENT TO BRIEF AND ARGUMENT FOR BUNTE BROTHERS, INC., RESPONDENT.

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SUPPLEMENT TO BRIEF AND ARGUMENT FOR BUNTE BROTHERS, INC., RESPONDENT.

Respondent, Bunte Brothers, Inc., respectfully presents the following suggestions supplementing its brief heretofore filed.

SUPPLEMENT TO POINT II OF RESPONDENT'S BRIEF.

The Federal Trade Commission Act defines the "commerce" over which the Federal Trade Commission has jurisdiction as "commerce among the several states * * *" (38 Stat. 719; 15 U.S.C. Sec. 44). Thus the Act is designed

to arrest the progress of unfair activities moving across state lines. That it is the uniform understanding of the courts that the methods enjoinable must be used in interstate operations is shown by the following cases in addition to those cited in Respondent's brief (page 10).

In *National Silver Co.* v. *Federal Trade Commission* (C.C.A. 2), 88 Fed. (2d) 425, the court said at page 427:

> "To sustain the order of the Commission, it is essential to find that the methods used are unfair *and that they are used in interstate commerce* and that the proceeding instituted for a cessation thereof is in the interest of the public." (Italics supplied:)

In *Berkey & Gay Furniture Co.* v. *Federal Trade Commission* (C. C. A. 6) 42 Fed. (2d) 427, the court said at page 429:

> "Section 5 of the act (Act Sept. 26, 1914, c. 311, Sec. 5, 38 Stat. 719; Act. Feb. 13, 1925, c. 229, Sec. 2, 43 Stat. 939 (15 USCA Sec. 45)) declares only 'unfair methods of competition' unlawful, and empowers the Commission, in the public interest, *to prevent persons engaging in such commerce from using unfair methods of competition therein.*" (Italics supplied.)

To the same effect, *Eastman Kodak Co.* v. *Federal Trade Commission* (C. C. A. 2), 7 Fed. (2d) 994, 996 (affirmed *Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U. S. 619, 623), *Federal Trade Commission* v. *Maisel Trading Post* (C. C. A. 10), 77 Fed. (2d) 246, 247, *E. Griffiths Hughes, Inc.* v. *Federal Trade Commission* (C. C. A. 2), 77 Fed. (2d) 886, 887, *Electro Thermal Co.* v. *Federal Trade Commission* (C. C. A. 9), 91 Fed. (2d) 477, 478, *Butterick Pub. Co.* v. *Federal Trade Commission* (C. C. A. 2), 85 Fed. (2d) 522, 525, *Hills Bros.* v. *Federal Trade Commission* (C. C. A. 9), 9 Fed. (2d) 481, 484.

In the foregoing cases the commercial operations under inquiry were found to cross state lines. Moreover, on those

rare attempts by the Commission to assume jurisdiction over methods of competition used in sales wholly within a state, the cease and desist orders entered by the Commission have been consistently reversed. See cases cited in Respondent's brief p. 10-11 and Appendix B.

SUPPLEMENT TO POINT III OF RESPONDENT'S BRIEF.

The Sherman Act does not refer to combinations and conspiracies *in* interstate commerce but, by its express language, to such practices which operate "*in restraint of* trade or commerce among the several states, or with foreign nations * * *." Plainly, this language expressly contemplates a direct effect upon interstate commerce. See *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 493, 501.

Hence the Sherman Act predicates federal jurisdiction upon the *effect or impact* upon interstate commerce, without regard to the locale of the combination or conspiracy, while the Trade Commission Act makes the unlawfulness of unfair trade practices depend upon their *use* in transactions crossing state lines.

SUPPLEMENT TO POINT IV OF RESPONDENT'S BRIEF.

Petitioner attempts to avoid the deliberate selection of language by Congress in various comparable statutes which evidences congressional recognition of the difference between the expressions "in commerce" and "affecting commerce." In that connection Petitioner argues that none of the other statutes deals with the regulation of intrastate transactions which affect interstate commerce through competition between intrastate and interstate operators. That this position is incorrect is demonstrated, for example, by the Bituminous Coal Conservation Act, which Petitioner itself cites at page 21 of its brief and the language of which appears on page 3 of Appendix D to Respondent's brief. This statute which was passed in April of 1937,

about one year prior to the enactment of the Wheeler-Lea Amendment to the Trade Commission Act, expressly deals with intrastate transactions which affect interstate commerce in coal by causing unreasonable advantages or discriminations in favor of an intrastate business.

The doctrine of the *Shreveport* case (234 U. S. 342) is explained by *Palmer* v. *Massachusetts*, 308 U. S. 79, where Mr. Justice Frankfurter delivering the opinion of the court said, at page 84:

> "To be sure, in recent years Congress has from time to time exercised authority over purely intrastate activities of an interstate carrier when, in the judgment of Congress, an interstate carrier constituted, as a matter of economic fact, a single organism and could not effectively be regulated as to some of its interstate phases without drawing local business within the regulated sphere. [4 E. g., Shreveport Cases (*Houston, E. & W. T. R. Co.* v. *United States*) 234 U. S. 342, 58 L. ed. 1341, 34 S. Ct. 833; *Railroad Commission* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 66 L. ed. 371, 42 S. Ct. 232, 22 A. L. R. 1086. See 1 Sharfman, 'The Interstate Commerce Commission,' pp. 82-86, 219-225. For the careful observance of state interests in applying the Shreveport doctrine, see *Illinois C. R. Co.* v. *State Pub. Utilities Commission*, 245 U. S. 493, 62 L. ed. 425, 38 S. Ct. 170, P. U. R. 1918C, 279, and *Florida* v. *United States*, 282 U. S. 194, 75 L. ed. 291, 51 S. Ct. 119.] But such absorption of state authority is a delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions. [5. See Clark, 'The Rise of a New Federalism,' passim.] Therefore, in construing legislation this court has disfavored inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress.

Minnesota Rate Cases (*Simpson* v. *Shepard*), 230 U. S. 352, 57 L. ed. 1511. 33 S. Ct. 729, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; cf. *Kelly* v. *Washington*, 302 U. S. 1, 82 L. ed. 3, 58 S. Ct. 87."

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 85.—October Term, 1940.

Federal Trade Commission, Petitioner, vs. Bunte Brothers, Inc. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[February 17, 1941.]

Mr. Justice Frankfurter delivered the opinion of the Court.

The Federal Trade Commission found that Bunte Brothers, candy manufacturers in Illinois, sold products there in what the trade calls "break and take" packages, which makes the amount the purchaser receives dependent upon chance; and that thereby it was enabled in the Illinois market to compete unfairly with manufacturers outside of Illinois who could not indulge in this device because the Trade Commission has barred "break and take" packages as an "unfair method of competition". Federal Trade Commission Act, § 5(a), 38 Stat. 719, as amended, 15 U. S. C. § 45; *Fed. Trade Comm.* v. *Keppel & Bro.*, 291 U. S. 304. Deeming the "break and take" sales unfair methods of competition under § 5, even though the sales took place wholly within Illinois, the Commission forbade Bunte Brothers further use of the device. The circuit court of appeals set aside the order, 110 F. (2d) 412, and we brought the case here because the issue at stake presents an important aspect of the interplay of state and federal authority. 311 U. S. —.

The scope of § 5 is in controversy.[1] That section, the court below held, authorizes the Commission to proceed only against business practices employed in interstate commerce. The Commission urges that its powers are not so restricted, that it may also proscribe unfair methods used in intrastate sales when these result in a handicap to interstate competitors.

While one may not end with the words of a disputed statute, one certainly begins there. "Unfair methods of competition in commerce" are the concern of § 5, and the Commission is "directed to prevent persons . . . from using unfair methods of competition in commerce . . ." The "commerce" in which these methods

[1] "Sec. 5. (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

"The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

are barred is interstate commerce.[2] Neither ordinary English speech nor the considered language of legislation would aptly describe the sales by Bunte Brothers of its "break and take" assortments in Illinois as "using unfair methods of competition in [interstate] commerce". When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly. See, for example, National Labor Relations Act, §§ 2(7), 9(c), 10(a), 49 Stat. 450, 453, 29 U. S. C. § 152(7), 159(c), 160(a); Bituminous Coal Act, § 4-A, 50 Stat. 83, 15 U. S. C. § 834; Federal Employers' Liability Act, § 1, 35 Stat. 65, as amended, 53 Stat. 1404, 45 U. S. C. § 51. To be sure, the construction of every such statute presents a unique problem in which words derive vitality from the aim and nature of the specific legislation. But bearing in mind that in ascertaining the scope of congressional legislation a due regard for a proper adjustment of the local and national interests in our federal scheme must always be in the background, we ought not to find in § 5 radiations beyond the obvious meaning of language unless otherwise the purpose of the Act would be defeated. *Minnesota Rate Cases,* 230 U. S. 352, 398-412.

That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not dependent on control over intrastate transactions.[3] Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of

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[2] "Sec. 4. The words defined in this section shall have the following meaning when found in this Act, to wit:

"'Commerce' means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any state or foreign nation, or between the District of Columbia and any State or Territory or foreign nation."

[3] The Commission makes no claim of a contrary administrative practice. The cases which it cites in no way mitigate what is stated in the text of the opinion. (1) Counsel for the Commission apparently argued for recognition of the power claimed here in Canfield Oil Co. *v.* Fed. Trade Comm., 274 Fed. 571, but the Commission had made no findings of discrimination against commerce and had only found that the Oil Company was engaged in commerce. (2) The jurisdiction sustained in Chamber of Commerce of Minneapolis *v.* Fed. Trade Comm., 13 F. (2d) 673, was very different from that claimed here. It rested on the fact that the Chamber conducted a market for grain in the current of interstate commerce. See Chicago Board of Trade *v.* Olsen, 262 U. S. 1, and cases cited. (3) The order of the Commission reviewed in California Rice Industry *v.* Fed. Trade Comm., 102 F. (2d) 716, resulted from proceedings instituted more than a year after this proceeding against Bunte Brothers had begun.

power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred. See *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 315. This practical construction of the Act by those entrusted with its administration is reinforced by the Commission's unsuccessful attempt in 1935 to secure from Congress an express grant of authority over transactions "affecting" commerce in addition to its control of practices in commerce. S. Rep. No. 46, 74th Cong., 1st Sess. These circumstances are all the more significant in that during the whole of the Commission's life the so-called *Shreveport* doctrine operated in the regulatory field committed to the Interstate Commerce Commission. And it is that doctrine which gives the contention of the Trade Commission its strongest support.

Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business. The Interstate Commerce Act and the Federal Trade Commission Act are widely disparate in their historic settings, in the enterprises which they affect, in the range of control they exercise, and in the relation of these controls to the functioning of the federal system. We need not at this late day rehearse the considerations that led to the *Shreveport* decision. *Houston & Texas Ry.* v. *United States,* 234 U. S. 342. The nub of it, in the language of Chief Justice Taft, lay in the relation between intrastate and interstate railroad traffic: "Effective control of the one must embrace some control over the other in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them." *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R.,* 257 U. S. 563, 588. And so when the Interstate Commerce Commission found that the intrastate rates of a carrier subject to the Act in effect operated as a discrimination against its interstate traffic, this Court sustained the power of the Commission to bring the two rates into harmonious relation and thereby to terminate the unlawful discrimination. Congress in 1920 revised the Interstate Commerce Act and explicitly confirmed this power of the Commerce Commission. 41 Stat. 484, 49 U. S. C. § 13(4).

There is the widest difference in practical operation between the control over local traffic intimately connected with interstate traffic and the regulatory authority here asserted. Unlike the relatively precise situation presented by rate discrimination, "unfair competition" was designed by Congress as a flexible concept with evolving content. *Fed. Trade Comm.* v. *Keppel & Bro., supra,*

at 311-312. It touches the greatest variety of unrelated activities. The Trade Commission in its Report for 1939 lists as "unfair competition" thirty-one diverse types of business practices which run the gamut from bribing employees of prospective customers to selling below cost for hindering competition.[4] The construction of § 5 urged by the Commission would thus give a federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local law. Such control bears no resemblance to the strictly confined authority growing out of railroad rate discrimination. An inroad upon local conditions and local standards of such far-reaching import as is involved here, ought to await a clearer mandate from Congress. The problem now before us is very different from that which was recently presented by *United States* v. *F. W. Darby Lumber Co.*, No. 82, decided February 3, 1941. We had there to consider the full scope of the constitutional power of Congress under the Commerce Clause in relation to the subject matter of the Fair Labor Standards Act. This case presents the narrow question of what Congress did, not what it could do. And we merely hold that to read "unfair methods of competition in [interstate] commerce" as though it meant "unfair methods of competition in any way affecting interstate commerce", requires, in view of all the relevant considerations, much clearer manifestation of intention than Congress has furnished.

Affirmed.

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[4] Report, pp. 83, 88. And see these additional examples (pp. 83, 85, 89):

"6. Making false and disparaging statements respecting competitors' products and business, in some cases under the guise of ostensibly disinterested and specially informed sources or through purported scientific, but in fact misleading, demonstrations or tests; and making false and misleading representations with respect to competitors' products, such as that seller's product is competitor's, and through use of such practices as deceptive simulation of competitor's counter-display catalogs or trade names; and that competitor's business has been discontinued, and that seller is successor thereto or purchaser and owner thereof."

"10. Selling rebuilt, second-hand, renovated, or old products or articles made from used or second-hand materials as and for new."

"19. Using containers ostensibly of the capacity customarily associated in the mind of the general purchasing public with standard weights or quantities of the product therein contained, or using such standard containers only partially filled to capacity, so as to make it appear to the purchaser that he is receiving the standard weight or quantity."

"30. Failing and refusing to deal justly and fairly with customers in consummating transactions undertaken, through such practices as refusing to correct mistakes in filling orders, or to make promised adjustments or refunds, and retaining, without refund, goods returned for exchange or adjustment, and enforcing, notwithstanding agents' alterations, printed terms of purchase contracts, and exacting payments in excess of customers' commitments."

"31. Shipping products at market prices to its customers or prospective customers or to the customers or prospective customers of competitors without an order and then inducing or attempting by various means to induce the consignees to accept and purchase such consignments."

SUPREME COURT OF THE UNITED STATES.

No. 85.—October Term, 1940.

Federal Trade Commission, Petitioner, *vs.* Bunte Brothers, Inc. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[February 17, 1941.]

Mr. Justice Douglas, dissenting.

In my opinion the judgment should be reversed.

The Commission found that respondent's "use of chance assortments in the sale and distribution of its candies in Illinois has a direct and powerful burdensome effect upon interstate commerce in candies from other states to the State of Illinois, and gives respondent an undue and unreasonable preference over competitors located in other states." The validity of that finding and of the Commission's conclusion that respondent's practices constitute unfair methods of competition are not in issue. The only question presented by this petition for certiorari is whether respondent's practices constitute unfair methods of competition "in commerce" within the meaning of § 5(a) of the Federal Trade Commission Act.

I think they do.

Unfair competition involves not only an offender but also a victim. Here some of the victims of the unfair methods of competition are engaged in interstate commerce. The fact that the acts of the offender are intrastate is immaterial. The purpose of the Act is to protect interstate commerce against specified types of injury. So far as the jurisdiction of the Commission is concerned, it is the existence of that injury to interstate commerce not the interstate or intrastate character of the conduct causing the injury which is important. An unfair method of competition is "in" interstate commerce not only when it has an interstate origin but also when it has a direct interstate impact. Respondent is "using" unfair methods of competition "in" interstate commerce when the direct effect of its conduct is to burden, stifle, or impair that commerce.

Under the Sherman Act (26 Stat. 209) a contract or conspiracy may be "in restraint of trade or commerce among the several

States" even though the acts or conduct are intrastate. *Swift & Co.* v. *United States,* 196 U. S. 375, 397; *United States* v. *Patten,* 226 U. S. 525, 541-543; *Standard Oil Co.* v. *United States,* 283 U. S. 163, 168-169. Sec. 5 of the Federal Trade Commission Act is "supplementary" to the Sherman Act. *Federal Trade Commission* v. *Raladam Co.,* 283 U. S. 643, 647. Like the Sherman Act it seeks "to protect the public from abuses arising in the course of competitive interstate and foreign trade. . . . The paramount aim of the act is the protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree." *Federal Trade Commission* v. *Raladam Co., supra,* pp. 647-648. And as this Court said in *Federal Trade Commission* v. *Beech-Nut Packing Co.,* 257 U. S. 441, 453, the declaration of public policy contained in the Sherman Act is "to be considered in determining what are unfair methods of competition, which the Federal Trade Commission is empowered to condemn and suppress." For the Federal Trade Commission Act "undoubtedly was aimed at all the familiar methods of law violation which prosecutions under the Sherman Act had disclosed." *Federal Trade Commission* v. *Keppel & Bro.,* 291 U. S. 304, 310.

That history, of course, does not give us license to disregard plain and unambiguous limitations on the power of the Commission. But it does admonish us to construe one of a series of legislative acts dealing with a common or related problem in light of the integrated statutory scheme. See *United States* v. *Hutcheson,* No. 43, decided February 3, 1941. It warns us not to whittle away administrative power by resolving an ambiguity against the existence of that power where the full arsenal of that power is necessary to cope with the evil at hand. The evil here is direct, injurious discrimination against interstate commerce. The Commission has issued orders against some 120 of respondent's competitors prohibiting them from selling chance assortments of candy in interstate commerce. Under this decision respondent may continue to use this same unfair method of competition to increase its business at the expense of those who sell in interstate commerce and who are not free to employ the same methods in self-defense. I think the Act, an exercise by Congress of its commerce power, should be interpreted to protect interstate commerce not to permit discrimination against it.

Such an approach was used in the *Shreveport* case (234 U. S. 342) to give the Interstate Commerce Commission control over intrastate rates which injuriously affected, through an unreasonable

discrimination, traffic that was interstate. That result was reached though the Act expressly denied the Commission any jurisdiction where the "transportation" was "wholly within one State". This Court said (234 U. S. at p. 358) that those words had "appropriate reference to exclusively intrastate traffic, separately considered; to the regulation of domestic commerce, as such. The powers conferred by the act are not thereby limited where interstate commerce itself is involved." The interrelation between the intrastate and interstate activities in the instant case is hardly less intimate than in the *Shreveport* case. The fact that the nexus here is economic and not physical is inconsequential. In this case as in the other the problem is the existence of administrative authority to provide effective protection of interstate commerce against discrimination. In the *Shreveport* case statutory doubts were resolved so as to strengthen the administrative process even against the claim that thereby the state authorities would be "shorn of those powers which alone can justify their existence." Similar arguments should not deter us from being tolerant of an asserted power, admittedly constitutional, to deal effectively with the realities of economic interdependence.

The fact that a clarifying amendment to the Act was sought which would have removed the doubts as to the meaning of "in commerce" is not material except to the extent that it shows that doubts existed. It does not aid in resolving those doubts. To be sure, recent statutes dealing with other fields have removed such doubts by explicit provisions. But they are of little aid in interpreting an earlier act in its own legislative setting. See *United States* v. *Stewart*, 311 U. S. 60, 69. And as to the charge that for a quarter of a century the Commission made no claim to such a power, two answers may be made. In the first place, as early as 1921, the Commission urged that the doctrine of the *Shreveport* case permitted an interpretation of the Act which would give it control over certain intrastate activities. *Canfield Oil Co.* v. *Federal Trade Commission*, 274 Fed. 571; Hankin, Jurisdiction of the Federal Trade Commission, 12 Calif. L. Rev. 179, 197, *et seq.* Although the question does not appear to have been definitely settled, in 1926 the Commission received some support for its view. See *Chamber of Commerce* v. *Federal Trade Commission*, 13 F. (2d) 673, 684. Cf. *American Can Co.* v. *Ladoga Canning Co.*, 44 F. (2d) 763, 770-771. But in 1939 that power was denied. *California Rice Industry* v. *Federal Trade Commission*, 102 F. (2d) 716, 723. Non-

use of the asserted power clearly cannot be inferred from that record. In the second place, it would not be relevant if this power did lay dormant for years. Mere non-use does not subtract from power which has been granted. The host of practical reasons which may defer exhaustion of administrative powers lies in the realm of policy. From that delay we can hardly infer that the need did not or does not exist.

Mr. Justice BLACK and Mr. Justice REED join in this dissent.